Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2000

WENDA K. SHALTRY, BANKRUPTCY TRUSTEE FOR HOME AMERICA T.V.-APPLIANCE AUDIO, INC., J.G. BOYD T.V.-APPLIANCE AUDIO, INC., AND CHARLESTON T.V. & APPLIANCE CO.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

AMENDED PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

April 30, 2001

John J. Dawson (Counsel for the Petitioner)
Gerald L. Shelley (Of Counsel for the Petitioner)
Benjamin R. Norris (Of Counsel for the Petitioner)
QUARLES & BRADY STREICH LANG LLP
Renaissance One
Two North Central Ave.
Phoenix, AZ 85004-2391
(602) 229-5200

Ronald J. Ellett (Of Counsel for the Petitioner)
2828 North Central Avenue, Suite 1150
Phoenix, AZ 85004
(602) 235-9510

94 pp

QUESTIONS PRESENTED

1. Wenda Shaltry, trustee for Home America in this involuntary bankruptcy, discovered that Home America's parent corporation had made a post-petition tax election depriving Home America of a $1.6 million federal tax refund. Shaltry filed a timely refund claim with the IRS, seeking to avoid the election; her claim was also filed before the time to file an 11 U.S.C. § 549 avoidance action had expired. Shaltry then waited the 120 days required by 11 U.S.C. § 505(a)(2)(B)(i) and filed this timely tax refund suit, which the government responded to by claiming that it was an untimely § 549 avoidance action. Accepting the government's argument and refusing to follow In re Russell, 927 F.2d 413 (8th Cir. 1991), the Ninth Circuit dismissed this refund suit, thereby creating a conflict between the two Circuits. Was the Ninth Circuit correct in refusing to follow In re Russell by dismissing this timely 26 U.S.C. §7422 refund suit?

2. 11 U.S.C. §§ 303 and 362(a) make actions in violation of the automatic stay after the filing of an involuntary bankruptcy petition void. Was the net operating loss carryforward election made by Home America's parent corporation post-petition but prior to the appointment of Shaltry, void *ab initio*, so that Shaltry had no need to exercise her avoidance powers under 11 U.S.C. § 549(d) in order to proceed with her timely 26 U.S.C. § 7422 refund suit?

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LIST OF PARTIES AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record for Trustee Wenda K. Shaltry certifies that the following listed parties have an interest in the outcome of this case:

1. Wenda K. Shaltry, Trustee
2. Maryland Investments, Inc.
3. Home America T.V.-Appliance-Audio, Inc.
4. J.G. Boyd T.V.-Appliance-Audio, Inc.
5. Charleston T.V. & Appliance Co.
6. The United States

Pursuant to Supreme Court Rule § 29.6, the corporations identified above, Maryland Investments, Inc., Home America T.V.-Appliance-Audio, Inc., J.G. Boyd T.V.-Appliance-Audio, Inc., Charleston T.V. & Appliance Co., and the United States, are interrelated as follows:

a. Prior to March 1, 1989, Maryland Investments, Inc. owned 75% of the voting stock of Home America T.V. Appliance Audio, Inc. and Robert Palko owned the remaining 25%.

b. J.G. Boyd T.V. Appliance Audio, Inc. and Charleston T.V. Appliance Co. were wholly-owned subsidiaries of Home America.

c. On March 31, 1989, Maryland acquired Palko's 25% interest in Home America resulting in Maryland's 100% ownership of all the classes of Home America's stock.

PRAYER FOR RELIEF

Wenda K. Shaltry, bankruptcy trustee for Home America T.V.-Appliance Audio, Inc., J.G. Boyd T.V.-Appliance Audio, Inc., and Charleston T.V. & Appliance Co., hereby prays for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit, with regard to the decision of that court reported as In re Home America, 232 F.3d 1046 (9th Cir. 2000).

OPINIONS BELOW

1. April 7, 1994 Bankruptcy Court judgment, denying the government's motions, and granting judgment in favor of Shaltry.

2. April 18, 1995 District Court order, in which the District Court ruled Maryland was a "necessary" party to Shaltry's refund action, pursuant to Fed. R. Bankr. P. 7019(a), and remanded. In re Home America, 193 B.R. 929 (D. Ariz. 1995).

3. September 11, 1995 District Court order, after a motion for reconsideration filed by Shaltry, reaffirming the District Court's April 18, 1995 ruling and remanding the case to the Bankruptcy Court.

4. November 19, 1997 Bankruptcy Court opinion, granting Shaltry her tax refund, and setting forth the reasons for its ruling.

5. January 9, 1998 Bankruptcy Court's formal judgment in favor of Trustee. A copy of this judgment, along with the minute entry order incorporated by reference is reproduced in the Appendix at pp. A-31 through A-54.

6. June 25, 1998 District Court order, affirming the Bankruptcy Court's memorandum decision granting Shaltry the tax refund. A copy of this order is reproduced in the Appendix at p. A-55.

7. November 15, 2000 Ninth Circuit Court of Appeals opinion, dismissing Shaltry's refund suit. In re Home

America, 232 F.3d 1046 (9th Cir. 2000), reproduced in the Appendix at pp. A-8 - A-26.

8. November 15, 2000 Decree of the Court from the Ninth Circuit Court of Appeals. A copy of this Judgment is reproduced in the Appendix at p. A-27 - A-28.

9. January 22, 2001 Ninth Circuit Court of Appeals order denying motion for reconsideration and remand. A copy of this order is reproduced in the Appendix at p. A-29 - A-30.

STATEMENT OF THE BASIS FOR JURISDICTION

1. The date the judgment or order sought to be reviewed was entered: Opinion of the United States Court of Appeals for the Ninth Circuit dated November 15, 2000, reported at 232 F.3d 1046.

2. Date of any order respecting or hearing: January 22, 2001 (order of the United States Court of Appeals for the Ninth Circuit, denying motion for reconsideration or remand).

3. Petitioner does not rely on Rule 12.5 of this Court.

4. The statutory provision conferring jurisdiction on this Court, review on a writ of certiorari of the judgment order in question: 28 U.S.C. §1254(1).

5. The petitioner does not believe that notification is required by Rule 29.4(b) or (c) of this Court.

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STATEMENT OF THE CASE

This case is a tax refund suit brought pursuant to 26 U.S.C. § 7422 by Shaltry against the government, seeking recovery of a tax refund of $1,610,761 that has been due for almost ten years, since May, 1991. Shaltry is seeking a writ of certiorari from the adverse decision of the United States Court of Appeals for the Ninth Circuit of November 15, 2000, reported at 232 F.3d 1046. The material facts leading up to Shaltry's refund claim, relating to the government's treatment of the refund claim, and relating to the subsequent litigation over Shaltry's refund claim, are set forth below:

1. Prior to March 1, 1989: Maryland Investments, Inc. ("Maryland") owned 75% of the voting stock of Home America; an individual named Robert Palko ("Palko") owned the remaining 25%. During this time, Home America had considerable financial difficulties.

2. March 31, 1989: On March 31, 1989, Maryland acquired Palko's 25% interest in Home America, resulting in Maryland's 100% ownership of all classes of Home America stock.

3. September 6, 1989: Home America's creditors filed the Chapter 7 involuntary petition[1] initiating this case. In re Home America, 232 F.3d 1046, 1048 (9th Cir. 2000).

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[1]See 11 U.S.C. § 303 and Fed. R. Bankr. P. 1010-13, governing involuntary cases.

4. September 19, 1989: During the "gap" period[2] following the filing of the involuntary petition, but before the appointment of Shaltry, Maryland and Home America for the first time filed a consolidated return, covering the 1989 tax year. In re Home America at 232 F.3d 1051 and n. 8. Critically, a consolidated net operating loss[3] attributable to Home America was included in the return, and an election under 26 U.S.C. § 172(b)(3) was made in the consolidated return[4] to forego the right to carry back the net operating losses. In re Home America at 232 F.3d 1048. The election made the net operating losses unavailable to offset Home America's past income, thereby depriving the

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[2]See 11 U.S.C. § 549(b) regarding the definition of the "gap" period and Shaltry's power to avoid transactions entered into by Home America during this period.

[3]Under 26 U.S.C. § 172, net operating losses are defined generally as "the excess of the deductions allowed by [26 U.S.C. §§ 1-1399] over the gross income." 26 U.S.C. § 172(c). Certain "modifications" to this definition are set forth in 26 U.S.C. § 172(d). The standard rule is that net operating losses may be "carried back" to the two (formerly three) tax years preceding the year in which the net operating loss accrues, or "carried over" to the following 20 (formerly 15) tax years. 26 U.S.C. § 172(b)(1)(A). Certain net operating losses may be carried back as far as 10 years prior to the tax year in which they are generated. See 26 U.S.C. § 172(b)(1)(C) and (f).

[4]Members of an affiliated group of corporations filing a consolidated return are treated as one taxpayer for purposes of 26 U.S.C. § 172. See 26 U.S.C. §§ 172(h)(4)(C) and 1501. An "affiliated group" consists of "includable corporations" connected through stock ownership by a common parent. 26 U.S.C. § 1504(a)(1)(A). A common parent must own stock equating to at least 80% of the voting power and 80% of the total value of stock in at least one of the other includable corporations. 26 U.S.C. § 1504(a)(1)(B), (2).

bankruptcy estate of the ability to file a refund claim by utilizing the net operating losses.

5. September 22, 1989: Shaltry was appointed trustee for Home America. In re Home America at 232 F.3d 1049.

6. May 24, 1991: On May 24, 1991, Shaltry filed a refund claim (in the form of amended tax returns) citing Shaltry's avoiding powers to set aside the gap-period election, and utilizing the net operating losses to claim a refund of approximately $1.6 million. In re Home America at 232 F.3d 1049. The refund claim consisted of amended returns for the years 1986, 1987 and 1989. Id.

7. September 19, 1991: The two-year anniversary of the filing of the gap-period tax return (which had made the relevant net operating loss elections) passed, with the government having issued a letter stating the claim had been accepted as filed, and without the government having stated it would either: (a) deny the refund claim, or (b) require that Shaltry maintain a § 549 action against Maryland as a condition of pursuing the refund claim.

8. September 24, 1991: Having received only a September 17, 1991 letter "accepting the return as filed," on September 24, 1991, Shaltry filed her first refund complaint, thereby initiating Adv. 91-896 123 days after filing her refund claim on May 24, 1991. In re Home America at 232 F.3d 1049. Thus, Shaltry filed her refund action only one day after the bankruptcy Court first had jurisdiction to hear the action under the 120 day rule contained in 11 U.S.C. § 505(a)(2)(B)(i) and 26 U.S.C. § 6532(a)(5); the 120 days from the May 24, 1991 filing of

the refund claim ran on Saturday, September 21, 1991, so the first day Shaltry could have filed her refund suit was Monday, September 23, 1991, and her refund suit was filed the next day, September 24, 1991.

9. October 18, 1991: On October 18, 1991, Shaltry wrote to the government, seeking information regarding when the refund would actually be issued and offering to do whatever was necessary to expedite the process. This letter also informed the government that the timing of the refund was important, because it would have a material impact upon winding up the estate's affairs.

10. November 4, 1991: The government responded, stating in a letter: "It is difficult to say precisely how long it will be until you receive the refunds. I am estimating a minimum of six months...."

11.. November 14, 1991: Ten days later, Shaltry received a letter from the U.S. Department of Justice confirming that the Department had received a copy of the complaint, but claiming the government had not been properly served. The letter concluded: "Please be advised that unless and until you comply with the service requirements of the Bankruptcy Rules, the United States declines to respond to your complaint." Having been told just ten days earlier that the estate was getting its refund, but that it would most likely take six months, Shaltry had no incentive to spend estate resources arguing with the government over service, particularly when it was clear that the government had received the complaint. Having been led to believe by the government that the refund was coming, Shaltry decided not to resolve this dispute at that time.

12. December 12, 1991: Shaltry entered into a settlement with, among others, Maryland -- which Shaltry had been suing for, among other things, Maryland's improper attempt to interfere with the estate's use of the net operating losses. In re Home America at 232 F.3d 1049. In the settlement, Maryland agreed that it would allow the estate to proceed with the refund claim and agreed not to interfere. Id.

13. December 18, 1991: Shaltry received a letter stating -- for the first time -- the government's intent to examine the amended returns for 1986 and 1987. Significantly, no reference was made to the 1989 amended return, the amended return that actually avoided Maryland's net operating loss election. The letter stated: "This determination has been made notwithstanding the letter . . . dated September 17, 1991, which was sent to you earlier."

14. January 29, 1992: The next move from the government was a motion to dismiss the complaint in Adv. 91-896.

15. February 13, 1992: Two weeks later, Shaltry received a hand-written memorandum from the government. The memo admitted Shaltry had supplied the IRS with all the information the IRS had requested. However, the memo continued by stating, among other things, "I talked to our attorney and they are still waiting for guidance on the technical matter on this claim. There may be a significant delay on getting that response. It may be necessary to request an extension. . . . I will contact you if that is required." At this point, the government was sending out contradictory and confusing signals. On the one hand, the IRS had indicated that a refund would be forthcoming. In addition, the IRS had acknowledged that Shaltry had provided all

requested information needed for the examination. On the other hand, the Department of Justice was attempting to dismiss the refund complaint, which Shaltry believed did not need to be litigated so long as the IRS did not change its stated intention to grant the refund, and the government wanted an extension of time, to review an unnamed "technical" issue.

16. April 23, 1992: It was not until April 23, 1992, that Shaltry received a letter that indicated that the refund claim might be disallowed, unless Shaltry could persuade the IRS otherwise.

17. September 24, 1992: Subsequently, on September 24, 1992, the government sent Shaltry a Form Letter 906(DO) notice of disallowance, indicating that the refund claim now had been disallowed, **specifically stating to Shaltry that she had two years from the date of the letter to file a suit for refund**:

> If you wish to bring suit or proceedings for the recovery of any tax, penalties or other moneys for which this disallowance notice is issued, you may do so by filing such a suit with the United States District Court having jurisdiction,[5] or the United States Claims Court. The law permits you to do this within 2 years from the mailing date of this letter.

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[5] Pursuant to 28 U.S.C. § 157(a) and the District Court's Amended General Order 126, the District Court had delegated jurisdiction over Shaltry's refund suit to the Bankruptcy Court.

See also In re Home America at 232 F.3d 1049. The only explanation was a cryptic postscript: "Reason for disallowance: It has not been proved that this is a valid claim."

18. December 11, 1992: Shortly thereafter, on December 11, 1992, the Bankruptcy Court issued a minute entry dismissing the complaint in Adv. 91-896, but stating:

> The Court has made this ruling in part based upon representations of the USA that it is aware of no statute of limitations that would bar Shaltry from refiling this action. Therefore, while the Court is mindful that the USA may have other grounds for seeking dismissal of any refiled action brought by Shaltry, an argument that Shaltry's action is barred by some statute of limitations would be closely scrutinized by this Court.

19. January 12, 1993: Since the Bankruptcy Court had invited Shaltry to file a second refund suit, along with the motion for reconsideration Shaltry did so, initiating Adv. 93-21 and seeking the same relief as was sought in Adv. 91-896.

20. June 25, 1993: After Shaltry pointed out that, contrary to its earlier representations, the government was in fact opposing Shaltry's suit for refund on a statute of limitations basis, the Court granted Shaltry's motion for reconsideration and reinstated the action.

21. June 16, 1993: The government also tried to have Adv. 93-21 dismissed. The Bankruptcy Court also denied this motion.

22. April 7, 1994: From this point, the two adversaries/refund suits continued on a parallel course: the government filed motions for summary judgment; Shaltry responded and moved for summary judgment against the government in each case. On April 7, 1994, the Bankruptcy Court denied the government's motions, and granted judgment in favor of Shaltry. The government appealed.

23. April 18, 1995: The District Court ruled Maryland was a "necessary" party to Shaltry's refund action, pursuant to B.R. 7019(a), and remanded. In re Home America, 193 B.R. 929 (D. Ariz. 1995).

24. September 11, 1995: After a motion for reconsideration filed by Shaltry, the District Court reaffirmed its April 18, 1995 ruling and remanded the case to the Bankruptcy Court.

25. April 11, 1996: Subsequently, Shaltry filed her Second Amended Complaint for tax refund, adding Maryland as a defendant in this action.

26. June 2, 1997: Shaltry moved for summary judgment against Maryland and the government.

27. June 4, 1997: The government then filed a motion to dismiss.

28. July 2, 1997: Apparently not satisfied with its motion to dismiss (for reasons not made clear) the government also cross-moved for summary judgment.

29. November 19, 1997: After further briefing and argument, the Bankruptcy Court granted Shaltry her tax refund, and set forth the reasons for its ruling.

30. January 9, 1998: The Bankruptcy Court entered formal judgment in favor of Shaltry.

31. June 25, 1998: After briefing by the parties, the District Court ruled, affirming the Bankruptcy Court's memorandum decision granting Shaltry the tax refund she has been seeking for the past eight years.

32. August 20, 1998: The government filed its notice of appeal to the United States Court of Appeals for the Ninth Circuit.

33. November 15, 2000: After briefing and oral argument, the United States Court of Appeals for the Ninth Circuit reversed the District Court's decision. In re Home America, 232 F.3d 1046 (9th Cir. 2000).

34. January 22, 2001: The United States Court of Appeals for the Ninth Circuit denied Shaltry's Petition for Remand or in the Alternative, for Rehearing.

REASONS FOR GRANTING THE WRIT

I. Shaltry's refund action is not barred by the statute of limitations contained in 11 U.S.C. § 549, because this action is a timely 26 U.S.C. § 7422 refund suit, not an untimely 11 U.S.C. § 549 avoidance action, as was held in In re Russell, 927 F.2d 413 (8th Cir. 1991).

The issue to be decided here -- whether Shaltry's suit is a 26 U.S.C. § 7422 refund suit or an 11 U.S.C. § 549 avoidance action -- is an important one.[6]

First, as a result of the contradictory results in In re Russell, 927 F.2d 413 (8th Cir. 1991) and In re Home America, 232 F.3d 1046 (9th Cir. 2000), there is now a split between two of the largest circuits over the fundamental nature of the rights of a trustee or debtor-in-possession in the circumstances presented here.

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[6] Although the Ninth Circuit did not reach the merits of Shaltry's refund claim (In re Home America at 232 F.3d 1050), it is clear that Shaltry was entitled to have her refund claim granted on its merits; both the United States Courts of Appeal that have considered the issue have reached this conclusion. In re Feiler, 218 F.3d 948 (9th Cir. 2000); In re Russell, 927 F.2d 413 (8th Cir. 1991). Other courts have also so held. In re Bakersfield Westar, 226 B.R. 227 (9th Cir. BAP 1998); In re Trans-Lines West, 203 B.R. 653, 665 (Bkrtcy. E.D. Tenn. 1996). Similarly, it is equally clear that the government is the proper defendant in this action, pursuant to 11 U.S.C. § 550. In re Feiler, 230 B.R. 164, 170 (9th Cir. BAP 1999), aff'd In re Feiler at 218 F.3d 956. Consequently, there is no question that Shaltry was entitled to have her refund claim granted on its merits, and that the government wrongfully denied Shaltry's refund claim, so the only question is whether Shaltry is entitled to pursue this refund suit in order to compel the government to follow the applicable law recognizing Shaltry's refund claim on its merits.

Second, the distinction between the two approaches is indeed fundamental. In In re Russell, the Eighth Circuit held that the avoidance powers provided in the Bankruptcy Code could be used by a trustee or debtor-in-possession as the basis of a 26 U.S.C. § 7422 refund suit, without actually bringing a separate avoidance action under 11 U.S.C. §§ 544-53. In re Russell at 927 F.2d 417. In contrast, the Ninth Circuit has taken the approach that it is not sufficient for a trustee or debtor-in-possession to file a refund claim and to bring a timely refund suit if the claim is denied or not granted, if the trustee or debtor-in-possession is utilizing its avoidance powers in making its refund claim. Instead, the Ninth Circuit now requires the trustee or debtor-in-possession to bring an avoidance action under 11 U.S.C. §§ 544-53, while also filing and litigating its tax refund claim. In re Home America at 232 F.3d 1050-51. Consequently, the statutory basis for a trustee's or debtor-in-possession's right to file and litigate a federal tax refund claim, and the proper procedure for doing so, are now in doubt as a result of the conflict between In re Russell and In re Home America.

The material facts in Russell were substantially similar to the material facts presented here. In Russell, the then debtor-in-possession made a post-petition carryforward election on October 10, 1984, and the trustee (appointed subsequent to the debtor's election) filed a refund claim on February 17, 1986. In re Russell at 927 F.2d 415 and 417. The IRS effectively denied the claim in June, 1986 by not responding to it within the 120 day period allowed by 26 U.S.C. § 6532(a)(5). Id. at 927 F.2d 417. The trustee then brought his refund suit March 19, 1987, twenty-nine months after the election had been made. Id. The government, as here, argued that the trustee's 26 U.S.C. § 7422 refund suit was in reality a 11 U.S.C. § 549 avoidance action, and therefore barred as untimely under 11 U.S.C. § 549(d)(1). Id. The Eighth Circuit

rejected the government's argument, recognizing that the relief sought by the trustee was a tax refund, and that the trustee's suit was a 26 U.S.C. § 7422 refund suit, not a 11 U.S.C.§ 549 action: **"The IRS's argument fails because trustee's suit is not an action or proceeding under 11 U.S.C. § 549, but rather a refund suit under 28 U.S.C. § 1346(a)(1). The theory underlying the refund suit may involve a § 549 unauthorized post-petition transfer, but that does not make it a § 549 suit, and therefore § 549's statute of limitations is inapplicable."** Id. (emphasis added).

Thus, it is true that Shaltry is utilizing her powers under 11 U.S.C. § 549 action to avoid the tax elections engineered by Maryland, so that Shaltry could pursue this refund claim. However, that Shaltry exercised her powers under the Bankruptcy Code in order to avoid these tax elections does not alter the fundamental fact that this is a 26 U.S.C. § 7422 refund suit, not an 11 U.S.C. § 549 action. Even the government's own conduct belies its improvised theory that this suit is something other than a 26 U.S.C. § 7422 refund action. Until September 24, 1992, the government's only statement of its intentions was the letter dated September 17, 1991, stating that Shaltry's refund claim had been accepted as filed. See ¶8, at p. 4, supra. The government also cannot deny that when it did finally deny Shaltry's refund claim, it did so with a notice of disallowance that specifically stated that Shaltry had two years to bring a suit for refund. See ¶17, at pp. 6-7, supra. Only after this dispute was in litigation -- and after the running of the time allowed under 11 U.S.C. § 549(d) -- did the government take the position that Shaltry is somehow not seeking a tax refund and is barred by § 549(d) from obtaining the estate's rightful tax refund.

Notwithstanding the Russell analysis set forth above, in its ruling in this case, the Ninth Circuit held that Shaltry's refund claim actually consisted of two claims: First, a claim under 11 U.S.C. § 549 to avoid Home America's consent to filing a consolidated return and the net operating loss election, and second, a claim for refund under 26 U.S.C. § 7422. In re Home America at 232 F.3d 1051. According to the Ninth Circuit, "[t]he two claims are separate and distinct, except that in this case the latter is predicated on the validity of the former." Id. While superficially attractive, a close analysis of this approach reveals it to be fundamentally flawed.

First, under the approach required by the Ninth Circuit, trustees and debtors-in-possession in Shaltry's position will be required to file separate actions (an avoidance action under 11 U.S.C. §§ 544-53 and a separate 26 U.S.C. § 7422 refund suit) against a single defendant -- the government -- in order to obtain a single form of relief. No other court has required two separate suits against the government for a single form of relief under 26 U.S.C. § 7422. If the Ninth Circuit were correct on this theory, it would impose a large and unnecessary burden on bankruptcy trustees, the courts, and the government, since bankruptcy trustees would be compelled to file pointless suits to protect against the expiration of statutes of limitations, while simultaneously requesting the suits be held in abeyance while the government finished its administrative review of the trustees' claims. Requiring multiple lawsuits against a single defendant for a single form of relief -- as the Ninth Circuit has now mandated -- is absurd, and will only clog the already heavily-burdened federal courts with needless, duplicative litigation.

Second, the procedure called for by the Ninth Circuit would lead to nonsensical, legally impossible situations.

Following the Ninth Circuit's rule, a hypothetical trustee or debtor-in-possession in Shaltry's position -- i.e., a trustee or debtor-in-possession who has discovered a recoverable transfer within the time allowed by 11 U.S.C. § 549(d) or 11 U.S.C. § 546(a)(1) and who has filed a timely claim for refund but who is faced with the impending expiration of the § 549(d) period -- would be forced to file an avoidance action under 11 U.S.C. §§ 544-53 seeking the same relief that would still have to be sought in a subsequent 26 U.S.C. § 7422 refund suit, even though the jurisdictional 120-day period for seeking the requested relief (set forth in 26 U.S.C. § 6532(a)(5) and 11 U.S.C. § 505(a)(2)(B)(i)) would have not yet expired.[7] Even if the trustee or debtor-in-possession does so, he or she could easily find himself or herself facing the impending expiration of the two-year period after a denial of a claim for refund (contained in 26 U.S.C. § 6532(a)(1)), but still faced with years more litigation in the avoidance action – upon which the refund suit would be "predicated," to use the Ninth Circuit's term. Would the trustee then be forced to file the refund suit with the "predicate"

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[7] For example, in this case, the Ninth Circuit ruled that Shaltry should have brought an 11 U.S.C. § 549 avoidance action against the government by September 19, 1991, seeking a determination of the estate's rights to the net operating losses that would cause the estate to receive a tax refund of approximately $1.6 million. Yet the Bankruptcy Court did not have and could not have had jurisdiction to make any determination of any right of the estate to a tax refund until the 120 day period provided for in 11 U.S.C. § 505(a)(2)(B)(i) had run. This 120 day waiting period did not run until September 23, 1991 (the 120 days from the May 24, 1991 filing of the refund claim actually ran on Saturday, September 21, 1991, so the first day Shaltry could have filed her refund suit was Monday, September 23, 1991; her refund suit was filed the next day, September 24, 1991), four days after Shaltry was supposedly required to bring her § 549 avoidance action to determine her right to utilize the net operating losses in order to obtain a tax refund. In short, the Ninth Circuit has held that the statute of limitations to bring this law suit expired four days before the Bankruptcy Court (or any other court) could have had jurisdiction to grant the relief requested in this lawsuit.

avoidance action still unresolved? Could the trustee argue that because the avoidance action sought the same relief from the same defendant as the then still-to-be-filed refund suit, the avoidance action should be treated as if it were also the refund suit?

On the other hand, if the Ninth Circuit's "two claims" analysis is followed but the trustee or debtor-in -possession is required to bring the two suits as a single suit, if the suit were filed in time to comply with § 549(d), the premature filing of the suit over the 26 U.S.C. § 7422 refund claim would leave the bankruptcy court with **no jurisdiction** under 26 U.S.C. § 6532(a)(1). See, e.g., Thomas v. United States, 755 F.2d 728, 729 (9th Cir. 1985) (holding there is no jurisdiction to hear a 26 U.S.C. § 7422 refund suit, where the refund claim has not been rejected or not acted upon for six months). Far from halting the running of the 26 U.S.C. § 6532(a)(1) statute of limitations, the filing of a suit over which the court had no jurisdiction would be a nullity, and the government could move to dismiss for lack of subject matter jurisdiction (or the court could dismiss on its own motion) under F.R.C.P. 12(b)(1) at any time. Of course, if the trustee were to delay until the § 505(a)(2)(B)(i) 120 day period had passed, under the Ninth Circuit's approach, the trustee would be where the Ninth Circuit has left Shaltry – barred by the § 549(d) limitations period from obtaining relief.

In reality, notwithstanding the Ninth Circuit's analysis, there is but a single claim to be litigated here, as the above analysis shows. Is it reasonable to anticipate a trustee who did bring a separate timely refund suit and a separate timely avoidance action winning the avoidance action but losing the refund suit? Or losing the avoidance action but winning the refund suit? The answer is clearly "No" -- because both suits would be seeking the same relief from the same defendant. In

other words, the Ninth Circuit's "two separate claims" analysis does not make sense; it makes no sense at all to require two separate suits against the same defendant seeking the same relief.

Third, none of the Ninth Circuit's convoluted and illogical procedure is necessary in any way, either under the statutory scheme created under the Internal Revenue Code and the Bankruptcy Code (as the Eighth Circuit in In re Russell correctly held), or in order to protect the interest of the government in receiving timely notice of Shaltry's claims. The fundamental purpose of a limitations period – such as that set forth in 11 U.S.C. § 549(d) now relied upon by the government – is to require the plaintiff to put the defendant on notice of the plaintiff's claim within a of time designated by Congress, balancing the plaintiff's need for an opportunity to investigate the claim before bringing it and the defendant's right to have the claim brought within sufficient time so that it can preserve whatever relevant evidence it may need to properly defend itself. See Crown, Cork & Seal v. Parker, 462 U.S. 345, 352-53; 103 S.Ct. 2392, 2397 (1983) (commencement of class action served purpose of statute of limitations by putting defendants on notice of claims; holding that filing of class action tolled statute of limitations, in the event class certification denied); American Pipe and Construction Co. v. Utah, 414 U.S. 538, 554-55, 94 S.Ct. 756, 766-67 (1974) ("The policies of ensuring essential fairness to defendants . . . are satisfied when, as here, a named plaintiff who is found to be representative of a class commences a suit and thereby notifies the defendants . . . of the substantive claims being brought against them. . ."; holding that where class certification denied solely because potential class too numerous, statute of limitations was tolled for pendency of class action).

The same principal has been applied to claims for refund. Bemis Bros. Bag Co. v. United States, 289 U.S. 28, 33-34, 53 S.Ct. 454, 456-57 (1933) (where claim for refund put government on notice of the basis of taxpayer's claim, subsequent amendment of claim refining but not altering substance of claim, otherwise untimely, held allowed); see also Leeke v. United States, 737 F.Supp. 1013 1016-17 (S.D. Ohio 1990) (discussing case law finding informal claims for refund sufficient for jurisdictional purposes under 26 U.S.C. § 7422, so long as the government has actual notice of the claim). The entire purpose of requiring a taxpayer to file a claim for refund with the IRS and then giving the IRS a fixed period of time to review and decide the claim is to avoid refund suits in circumstances where the taxpayer and the IRS may still be able to resolve their differences at the administrative level, without needless litigation. In the course of this process, the taxpayer necessarily puts the IRS on notice of the taxpayer's claims.

Here, Shaltry's filing of her refund claim with the IRS put the government on notice of her claims. Once Shaltry filed her claim for refund – on May 24, 1991, well within the time allowed under 11 U.S.C. § 549(d) – filing a separate avoidance action under § 549 would have served no function in terms of putting the government on notice of Shaltry's claims. Shaltry was still required to bring her refund suit within the time allowed by 26 U.S.C. § 6532(a), since Congress specified this limit for suits over refund claims – which she did comply with – but the Ninth Circuit's holding that Shaltry was also subject to the separate limitation set forth in 11 U.S.C. § 549 -- a requirement not set forth or recognized anywhere in the Internal Revenue Code in relation to refund claims -- served no useful purpose whatsoever.

Fourth, the two-year limitation set forth in 11 U.S.C. § 549(d) (and the parallel provisions of 11 U.S.C. § 546) is not absolute. Thus, it is well established that the § 549(d) limitation period is subject to equitable tolling. Olsen v. Zerbetz, 36 F.3d 71, 73 (9th Cir. 1994) (so holding with respect to § 549, while noting that "[e]very court that has considered the issue has held that equitable tolling applies to § 546(a)(1)"); In re M&L Business Machine Co., Inc., 75 F.3d 586, 591 (10th Cir. 1996) (so holding with respect to § 546(a)(1)). While equitable tolling is usually applied when the party against whom the doctrine is asserted engages in fraud or concealment, the doctrine also applies in circumstances where "extraordinary circumstances beyond plaintiff['s] control made it impossible to file claims on time." M&L Business Machine Co., Inc. at 75 F.3d 591 (citing In re M&L Business Machines, Inc., 153 B.R. 308, 311 (D. Colo. 1993) for the proposition that "equitable tolling available while trustee appealed decision that she lacked standing to assert avoidance proceeding; initiation of avoidance action under those circumstances would have been waste of time"). Here, even if there was no fraud or concealment by the government, the limitation set forth in 11 U.S.C. § 505(a)(2)(B)(i) made it impossible for Shaltry to file her refund suit before September 23, 1991, and she diligently filed her refund suit the very next day, September 24, 1991. Although it is true that Shaltry could have filed her refund suit a day earlier, it is also true that it is not reasonable to read into 11 U.S.C. § 549(d) and 26 U.S.C. § 6532(a)(1) a Congressional intent to create a one-day window for filing a refund suit; such a harsh rule would hardly be compatible with the concept of "equitable" tolling. What is most important is that, as the application of the doctrine of equitable tolling shows, the limitations period set forth in § 549(d) is subject to equitable doctrines, and a Bankruptcy Court is a court of equity. Given this, it is reasonable for a bankruptcy court to use its equity

powers under 11 U.S.C. § 105 to find that a refund suit brought in circumstances such as those presented here – one day after the first day such suit could have been filed, in circumstances where the defendant (the government) had been put on formal written notice of Shaltry's claim long before the running of any applicable period of limitations – was indeed a timely refund suit.

Fifth, as the Ninth Circuit itself has acknowledged in In re Schwartz, 954 F.2d 569, 573-74 (9th Cir. 1992), the principal purpose of 11 U.S.C. § 549 is to deal with transactions in which the debtor is a willing participant, not an unwilling puppet. See Section II, below. As is also explained in Section II, as a matter of law, Home America's consent to the filing of a consolidated return with its parent corporation did not constitute consent to the transfer of its valuable net operating losses or its right to a tax refund. Consequently, 11 U.S.C. § 549 does not directly apply in the circumstances presented. Rather, as the Eighth Circuit would conclude under its reasoning set forth in In re Russell, Shaltry's refund suit is not an avoidance action under 11 U.S.C. § 549, but a refund suit under 28 U.S.C. § 1346(a)(1) and 26 U.S.C. §§ 6532 and 7422. The theory underlying Shaltry's refund suit may involve 11 U.S.C. § 549, but that does not make it a § 549 suit, and the § 549(d) statute of limitations does not apply.

What the Ninth Circuit is really saying is that Shaltry was supposed to have abandoned the government's administrative refund claim procedure because of the bankruptcy context of this case. This makes no sense. There is no logic to a position that would require trustees and debtors-in-possession to bring pointless and illegal lawsuits – suits over which no court can have jurisdiction – against the government, with the possibility still open that the government could agree with the trustees and debtors-in-possession at the administrative level. Consequently,

given (a) the conflict between the Circuits created by In re Russell and In re Home America over whether this action is a single 26 U.S.C. § 7422 suit for refund or whether Shaltry was also required to bring a separate 11 U.S.C. § 549 avoidance action, and (b) the significance of the issue to the practice of bankruptcy, Shaltry believes that a writ of certiorari should be granted in order to resolve this issue.

II. 11 U.S.C. §§ 303 and 362(a) have been fundamentally undermined by the refusal of the United States Court of Appeals for the Ninth Circuit to recognize that the act of Home America's parent corporation in filing a post-petition consolidated return with Home America, thereby carrying forward Home America's net operating losses and depriving Home America of a $1.6 million federal tax refund, violated the automatic stay and was void, not merely voidable.

It is undisputed that on September 6, 1989 Home America's creditors filed an involuntary bankruptcy petition initiating this case, and that on September 19, 1989 Maryland acted to consolidate itself with the Debtor for the purposes of gaining control over Home America's net operating losses. The net effect of these events was an act "to obtain possession of property of the estate" and "to exercise control over property of the estate" as contemplated under 11 U.S.C. § 362(a)(2).

This act was -- and is -- void under 11 U.S.C. § 362, not merely voidable under11 U.S.C. § 549. Under the explicit language of 11 U.S.C. § 362(a), the filing of an involuntary bankruptcy petition under 11 U.S.C. § 303 automatically triggers the 11 U.S.C. § 362(a) automatic stay: "Except as provided in

subsection (b) of this section [not applicable here], a petition filed under section . . . 303 of this title . . . operates as a stay. . . ." 11 U.S.C. § 362(a). The automatic stay has long been a fundamental principal of bankruptcy law, predating the enactment of the current Bankruptcy Code in 1978 by many decades. See Kalb v. Feuerstein, 308 U.S. 433, 438, 60 S.Ct. 343, 346 (1940) ("[I]f appellants are right [as the Court went on to hold] . . . the action of the Walworth County Court was not merely erroneous but was beyond its power, void, and subject to collateral attack"; holding that state law foreclosure proceedings taken in violation of the bankruptcy automatic stay were void). The vast majority of cases decided under the Bankruptcy Code have continued to recognize the rule that actions taken in violation of the automatic stay are void *ab initio*. See, e.g., In re Schwartz, 954 F.2d 569, 574 (9th Cir. 1992) (IRS assessment made during debtor's bankruptcy in violation of 11 U.S.C. § 362(a) automatic stay held void; debtor's right to litigate issue therefore not limited by).

The majority of Circuit Courts have held that actions in violation of the stay are void *ab initio*, **although there is a conflict among the Circuits on this issue, as well**. The Fifth Circuit is alone in explicitly holding that actions taken during the pendency of the stay are voidable. See Easley v. Pettibone Michigan Corp., 990 F.2d 905, 909-12 (6th Cir. 1993) (collecting and discussing Circuit decisions and pointing to the conflict based upon the Fifth Circuit's decision of Sikes v. Global Marine, 881 F.2d 176, 178 (5th Cir. 1989).[8] Even those courts holding that such acts are voidable have applied this logic only in limited

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[8] Because the void versus voidable issue is such an important issue in bankruptcy law, and because so many Circuit courts have issued differently-reasoned decisions on the issue, this is an area of law that would particularly benefit from this Court's guidance.

circumstances not present here in this involuntary bankruptcy. See Easley v. Pettibone Michigan Corp. at 990 F.2d 910-12 (acts in violation of stay are void, with limited equitable exception, where debtor unreasonably withholds notice of its bankruptcy and where creditor would be prejudiced as a result; dismissing action of creditor that failed to come within this limited exception); Sikes v. Global Marine, Inc., 881 F.2d 176, (5th Cir. 1989) (bankruptcy court could retroactively lift stay to allow creditor's suit brought outside the bankruptcy because the creditor had received no notice of the bankruptcy case).

Because 11 U.S.C. § 362 applies here, 11 U.S.C. § 549 does not. As the Ninth Circuit stated in In re Schwartz, 11 U.S.C. §§ 362(a) and 549 serve distinct purposes; § 362(a) applies to creditor actions to which the debtor does not freely and willingly consent, while § 549 applies where the debtor is a willing participant in the transaction in question. In re Schwartz at 954 F.2d 573-75. Here, Home America's consent to the filing of a consolidated return with its corporate parent did not take Maryland's action outside the realm of § 362(a). Consent to the filing of a consolidated return does not amount to consent to the transfer of a valuable asset, because such consent is an administrative convenience only. In re Prudential Lines, Inc., 928 F.2d 565, 569-71 (2nd Cir. 1991) (holding that the 11 U.S.C. § 362(a) would bar a parent corporation from taking a worthless stock deduction that would have barred the debtor subsidiary from utilizing its net operating losses, notwithstanding debtor's consent to filing of a consolidated return); see also In re Chateaugay Corp., 94 F.3d 772, 781-82 (2nd Cir. 1996) (following and reaffirming the logic of Prudential Lines on this point). "The common parent acts as an agent on behalf of all the members of the consolidated group 'for the convenience and protection of the IRS only.' The corporations retain their

separate identities and the property interests of the subsidiaries are not absorbed by the common parent." Prudential Lines at 928 F.2d 571 (citations omitted). The same held true under the Bankruptcy Act: "[C]onsent[] to the filing of a consolidated tax return . . . cannot be construed to include the transfer of a valuable asset without further consideration." In re Bob Richards Chrysler-Plymouth Corp., 473 F.2d 262, 264 (9th Cir. 1973) (debtor corporation's consent to filing of consolidated return did not constitute consent that benefit of net operating losses should flow to other members of the consolidated group).

Furthermore, a creditor's act that would otherwise deprive the debtor of the use of its net operating losses is subject to the § 362 automatic stay, because the net operating losses are property of the debtor (as Prudential Lines and Bob Richards Chrysler-Plymouth held), and therefore property of the bankruptcy estate under 11 U.S.C. § 541. In re Prudential Lines at 928 F.2d 573-74 (holding that § 362 automatic stay barred debtor's parent corporation from taking worthless stock deduction that would have destroyed the value of the debtor's net operating losses to the debtor).

For the foregoing reasons, the post-petition election to consolidate and transfer the net operating losses must be recognized as a violation of the automatic stay and was and is void *ab initio* under 11 U.S.C. § 362(a), while 11 U.S.C. § 549 -- and the limitations provision set forth in § 549(d) -- do not apply. The Ninth Circuit's refusal to recognize this is not only inconsistent with the logic of its own prior decision in Bob Richards Chrysler-Plymouth and the Second Circuit's decision in Prudential Lines, but also threatens to fatally undermine the purpose of 11 U.S.C. §§ 303 and 362(a) in involuntary bankruptcy cases, and the fundamental distinction between the roles of

11 U.S.C. §§ 362(a) and 549 within the Bankruptcy Code. Consequently, Shaltry believes that a writ of certiorari should be granted to resolve this issue as well.

CONCLUSION

For the foregoing reasons, Shaltry prays for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit, with regard to the decision of that court reported as In re Home America, 232 F.3d 1046 (9th Cir. 2000).

RESPECTFULLY SUBMITTED this 30th day of April, 2001.

John J. Dawson
QUARLES & BRADY STREICH LANG LLP
Renaissance One
Two North Central Ave.
Phoenix, AZ 85004-2391
(602) 229-5200

COUNSEL FOR THE PETITIONER

Gerald L. Shelley
Benjamin R. Norris
QUARLES & BRADY STREICH LANG LLP
Renaissance One
Two North Central Ave.
Phoenix, AZ 85004-2391
(602) 229-5200

Ronald J. Ellett, No. 012697
2828 North Central Avenue, Suite 1150
Phoenix, AZ 85004
(602) 235-9510

OF COUNSEL FOR THE PETITIONER

APPENDIX

Statutes and regulations involved in the case:

1. 11 U.S.C. § 325 provides: "A vacancy in the office of trustee during a case does not abate any pending action or proceeding, and the successor trustee shall be substituted as a party in such action or proceeding."

2. 11 U.S.C. § 362(a)(1) imposes: "a stay, applicable to all entities, of --- (1) the commencement or continuation of . . . a judicial, administrative, or other action or proceeding against the debtor . . ."

3. 11 U.S.C. § 362(b)(1), defines the § 362(a)(1) stay so that it does not included: " . . . the commencement or continuation of a criminal action or proceeding against the debtor. . . ."

4. 11 U.S.C.§ 362(b)(2)(A), provides that the § 362(a)(1) stay does not bar: ". . . the commencement or continuation of an action or proceeding for -- (i) the establishment of paternity; or (ii) the establishment or modification of an order for alimony . . ."

5. 11 U.S.C. § 362(b)(4) provides that the § 362(a)(1) stay does not bar: " . . . the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction . . ."

6. 11 U.S.C. § 546(a) provides that: "An action or proceeding under section 544, 545, 547, 548, or 553" may not be commenced after [the expiration of the specified statute of limitations]."

7. 11 U.S.C. § 549(d) provides that: "An action or proceeding under this section may not be commenced after [the expiration of the statute of limitations provided for]."

8. 11 U.S.C. § 550(f) provides that: "An action or proceeding under this section may not be commenced after the [expiration of the statute of limitations provided for]."

9. 11 U.S.C. §922(a)(1) provides that a petition filed under Chapter 9 stays, in addition to the § 362(a)(1) stay, "the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against an officer or inhabitant of the debtor that seeks to enforce a claim against the debtor . . ."

10. 26 U.S.C. § 172(b)(3) states: "Any taxpayer entitled to a carryback period under [11 U.S.C. § 172(b)(1)] may elect to relinquish the entire carryback period with respect to a net operating loss for any taxable year. Such election shall be made in such manner as may be prescribed by the Secretary, and shall be made by the due date (including extensions of time) for filing the taxpayer's return for the taxable year of the net operating loss for which the election is to be in effect. Such election, once made for any taxable year, shall be irrevocable for such taxable year.

11. 11 U.S.C. § 541(a) states: "The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

* * * *

(b) Property of the estate does not include—

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

(2) any interest of the debtor as a lessee under a lease of nonresidential real property . . .

(3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 . . . .

(4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that . . . .

(5) any interest in cash or cash equivalents that constitute proceeds of a sale by the debtor of a money order . . . .

* * * *

(c) (2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

12. 26 U.S.C. § 108 provides with regard to income from discharge of indebtedness:

(a) Exclusion from gross income.—

(1) In general.—Gross income does not include any amount which (but for this subsection) would be includible in gross income by reason of the discharge (in whole or in part) of indebtedness of the taxpayer if—

(A) the discharge occurs in a title 11 case,
(B) the discharge occurs when the taxpayer is insolvent,
(C) the indebtedness discharged is qualified farm indebtedness, or

(D) in the case of a taxpayer other than a C corporation, the indebtedness discharged is qualified real property business indebtedness.

13. 26 U.S.C. § 6501 provides with regard to limitations on assessment and collection:

> (a) General rule.—Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period. For purposes of this chapter, the term "return" means the return required to be filed by the taxpayer (and does not include a return of any person from whom the taxpayer has received an item of income, gain, loss, deduction, or credit).

14. 26 U.S.C. § 6532 provides with regard to periods of limitation on suits:

> (a) Suits by taxpayers for refund.—No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of

a notice of the disallowance of the part of the claim to which the suit or proceeding relates.

15. 26 U.S.C. § 7422 provides with regard to civil actions for tax refunds:

> (a) No suit prior to filing claim for refund.—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

16. 26 U.S.C. § 7502 provides with regard to timely mailing treated as timely filing and paying:

> (c) Registered and certified mailing.—
>
> (1) Registered mail.—For purposes of this section, if any such return, claim statement, or other document, or payment, is sent by United States registered mail—
>
> (A) such registration shall be prima facie evidence that the return, claim, statement, or other document was delivered to the agency, officer, or office to which addressed, and
>
> (B) the date of registration shall be deemed the postmark date.

(2) Certified mail.—The Secretary is authorized to provide by regulations the extent to which the provisions of paragraph (1) of this subsection with respect to prima facie evidence of delivery and the postmark date shall apply to certified mail.

17. 28 U.S.C. § 1346 provides, in actions where the United States is a defendant:

(a) The district courts shall have original jurisdiction, concurrent with the United States court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws; . . .

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE: HOME AMERICA T.V.-APPLIANCE AUDIO, INC. *Debtor.*	
UNITED STATES OF AMERICA, *Appellant,* v. WENDA K. SHALTRY, MARYLAND INVESTMENTS, *Appellees.*	No. 98-16631 D.C. No. CV 97-02485-WKU **OPINION**

Appeal from the United States District Court
for the District of Arizona
Warren K. Urbom, Senior District Judge, Presiding

Argued and Submitted
January 13, 2000--San Francisco, California

Filed November 15, 2000

Before: Arthur L. Alarcon, A. Wallace Tashima, and Barry G. Silverman, Circuit Judges.

Opinion by Judge Tashima

SUMMARY

Bankruptcy/Litigation and Procedure

The court of appeals reversed a judgment of the district court. The court held that a bankruptcy trustee's action under 26 U.S.C. § 7422 to recover a net operating loss (NOL) relinquished by a debtor as a means to claim a tax refund is governed by the statute of limitations applicable to actions to avoid transfers provided by 11 U.S.C. § 549(d).

Shortly after appellee Maryland Investments acquired debtor Home America T.V.-Appliance Audio, creditors filed an involuntary Chapter 7 bankruptcy petition against Home America; the bankruptcy court included Home America's wholly owned subsidiaries in the proceedings. In the period before an order for relief issued or a trustee was appointed, the debtors consented to the filing of a consolidated tax return with Maryland for the three months from April 1, 1989 to June 30, 1989.

On the consolidated return, Maryland invoked 26 U.S.C. § 172 and waived the carryback period for NOLs attributable to the debtors. Under the 1989 Internal Revenue Code (IRC), § 172 allowed Maryland to relinquish the carryback period and carry forward the NOLs to later tax years after the debtors had entered bankruptcy.

On September 22, 1989, appellee Wenda Shaltry became trustee for the debtors. On May 24, 1991, the trustee filed an amended tax return on behalf of the debtors for tax years 1986, 1987, and 1989, asserting her authority to avoid the consent to the consolidated return and Maryland's gap period election; her aim was to use the relinquished NOLs to claim a tax refund of about $1.6 million on behalf of the debtors' estate.

The IRS notified the trustee on September 17, 1991 that the return had been accepted as filed. On September 24, the trustee brought an adversary proceeding against appellant United States to recover the tax refund claimed on the amended return.

Contemporaneously, the trustee sued Maryland, alleging that it was liable to the debtors' estate for the relinquished carryback of the NOLs. In December, 1991, the trustee entered into a settlement agreement covering claims by and against various creditors, including the suit against Maryland. The settlement noted that the IRS had not approved or denied the tax refund claim.

On September 24, 1992, the IRS notified the trustee by mail that the claim had been disallowed on the grounds that it had not been proven valid, and any refund suit had to be filed within two years from the mailing of the letter.

After the trustee filed a second adversary proceeding for the refund in January 1993, the government and the trustee moved for summary judgment. By amendment to the complaint, Maryland was added as a party.

The bankruptcy court granted summary judgment for the trustee and granted the tax refund to the debtors' estate. The court

rejected the government's argument that the trustee's action was time-barred by § 549(d). The district court affirmed.

The government appealed, contending that the trustee's authority under § 549 did not allow her to avoid the debtors' consent to the filing of a consolidated tax return and Maryland's relinquishment of the carryback period for the NOLs, which are "irrevocable" under the IRC. Section 549(d) provides that avoidance actions cannot be commenced after the earlier of two years after the date of the transfer to be avoided, or the time the case is closed or dismissed.

The trustee countered that her action was for recovery of a tax refund under § 7422, and was therefore governed by the sum of the three-year limitations period for filing an administrative claim and the two year limitations period for filing a refund action after the IRS mails a notice of disallowance of the claim.

[1] The trustee's action involved two steps. First, avoidance of the debtors' consent to the consolidated return and Maryland's election to relinquish the NOLs via § 549; and second, recovery of a tax refund based on the NOLs under § 7422. The refund claim was futile unless the trustee was successful in her claim to avoid the transfer.

[2] Because this action could not be characterized as one only for a tax refund, the § 549 statute of limitations was applicable. Nor did considerations of public policy suggest otherwise once the avoidance claim and the refund claim were untangled. The two were separate and distinct, except that the latter was predicated on the validity of the former. Although the tax refund depended on the trustee's avoidance of the consent and election, the court of appeals did not have license to conflate the

two claims by applying the IRC statute of limitations to the trustee's exercise of her authority under the bankruptcy laws.

[3] Under § 549(d), the trustee had two years from the date of the transfer sought to be avoided to commence an avoidance proceeding. The consolidated tax return was filed on September 19, 1989, the date it was received by the IRS. Because the trustee did not commence an avoidance action until September 24, 1991- - more than two years after the transfer - - the action was barred by § 549(d).

[4] Principles of equitable estoppel did not prevent the government from asserting that the trustee's exercise of her avoidance powers was barred by § 549(d).

[5] With respect to the letter of September 17, 1991, the IRS properly considered the trustee's amended return as a refund claim, but did not address the separate avoidance claim on which the refund action was predicated. Moreover, an informal letter from the IRS that a return has been accepted as filed has no conclusive bearing on whether a refund claim is granted. This appeared to be confirmed by the settlement entered into by the trustee, which noted that the IRS had not approved or denied the refund claim.

[6] There was nothing to suggest that the trustee actually relied on the September 17 letter in deciding not to file suit before September 19- - when the two-year statute of limitations under § 549(d) expired - - but nevertheless deciding to file suit a week later on September 24, 1991. The trustee could not have relied on the September 24, 1992 notice of disallowance in missing the deadline, when that letter was sent more than a year after the deadline had passed. Equitable estoppel did not apply.

COUNSEL

Thomas J. Clark, Department of Justice, Washington, D.C., for the appellant.

Benjamin R. Norris, Quarles & Brady LLP, Phoenix, Arizona, for the appellee.

OPINION

TASHIMA, Circuit Judge:

The United States appeals the order of the district court affirming the bankruptcy court's grant of summary judgment in favor of the trustee who brought suit for recovery of a tax refund under 26 U.S.C. § 7422. In claiming a tax refund on behalf of the debtors' estate, the trustee sought to avoid, pursuant to 11 U.S.C. § 549, the debtors' consent to the filing of a consolidated tax return with their common parent corporation and the parent corporation's election under 26 U.S.C. § 172 to relinquish the carryback period for net operating losses attributable to the debtors. We hold that the bankruptcy trustee's action is barred by the statute of limitations applicable to her avoidance powers under § 549, notwithstanding that she seeks to exercise that authority in the context of a § 7422 tax refund suit. We therefore reverse.

I. BACKGROUND

In early 1989, Maryland Investments, Inc. ("Maryland") gained 100 percent ownership of all stock in Home America T.V.-Appliance Audio, Inc. ("Home America"). Several months later,

on September 6, 1989, creditors filed an involuntary bankruptcy petition against Home America under Chapter 7 of the Bankruptcy Code. Home America's two wholly-owned subsidiaries, J.G. Boyd T.V.-Appliance Audio, Inc. ("J.G. Boyd") and Charleston T.V. & Appliance Co. ("Charleston"), were subsequently included in the bankruptcy proceeding by order of the bankruptcy court.[9] Before an order for relief was filed and a trustee was appointed (during the "gap period"), the Debtors consented to the filing of a consolidated tax return with their common parent, Maryland, for the three-month period from April 1, 1989 to June 30, 1989. *See* 26 U.S.C. § 1501.[10]

On the consolidated return, Maryland elected to waive the carryback period for net operating losses attributable to the Debtors pursuant to the provisions of 26 U.S.C. § 172. Section 172 of the Internal Revenue Code ("IRC") defines net operating losses ("NOLs") generally as the amount by which deductions exceed gross income. *See* 26 U.S.C. § 172(c). Under the IRC in effect in 1989, § 172 provided that a NOL may be carried back to offset income during the three years preceding the year of the loss, and then, to the extent the loss was not fully absorbed by the taxpayer's income in the carryback years, it was to be carried forward to each of the 15 years, following the year of the loss.[11]

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[9] Home America, J.G. Boyd, and Charleston are collectively referred to as the "Debtors."

[10] The exact date the consolidated return was "filed" is in dispute and will be discussed below as it relates to the statute of limitations issue upon which we base our decision.

[11] The carryback period of § 172 has since been reduced to two years, and the carryforward period has been extended to 20 years. *See* Taxpayer Relief Act of 1997, Pub. L. 105-34, § 1082(a)(1)-(2).

The IRC, however, also contains a waiver provision whereby the taxpayer may irrevocably elect to relinquish the carryback period with respect to a NOL for any taxable year, thereby using the loss to offset income only in future years. *See* 26 U.S.C. § 172(b)(3).[12] Thus, rather than using the NOLs attributable to the Debtors to offset the Debtors' income in prior years, thereby reducing the Debtors' tax liability for those years, Maryland elected to relinquish the carryback period and to carry forward the NOLs to later tax years only after the Debtors had entered bankruptcy.

On September 22, 1989, Wenda K. Shaltry ("Trustee") was appointed the Chapter 7 trustee for the Debtors. On May 24, 1991, the Trustee filed an amended tax return on behalf of the

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[12] Under the IRC in effect in 1989, this provision read as follows:

> Any taxpayer entitled to a carryback period under paragraph (1) may elect to relinquish the entire carryback period with respect to a net operating loss for any taxable year ending after December 31, 1975. Such election shall be made in such manner as may be prescribed by the Secretary, and shall be made by the due date (including extensions of time) for filing the taxpayer's return for the taxable year of the net operating loss for which the election is to be in effect. Such election, once made, shall be irrevocable for that taxable year.

26 U.S.C. § 172(b)(3)(C).

The provision has since been recodified at 26 U.S.C. § 172(b)(3), with minor changes. *See* Revenue Reconciliation Act of 1990, Pub. L. 101-508, § 11811 (a).

Debtors for the tax years 1986, 1987, and 1989, asserting her authority to avoid their consent to the consolidated return and the gap period election by Maryland in order to utilize the relinquished NOLs to claim a refund of approximately $1.6 million on behalf of the Debtors' estate.[13] By letter dated September 17, 1991, the Internal Revenue Service ("IRS") informed the Trustee that "[i]n response to your request for prompt audit of the income tax return identified above, we are pleased to tell you that your return has been accepted as filed." One week later, on September 24, 1991, the Trustee filed an adversary proceeding in the bankruptcy court against the United

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[13] Although the Trustee has asserted her avoidance authority under several different sections of the Bankruptcy Code at various points during the course of this litigation, the section relevant to this appeal is 11 U.S.C. § 549, which provides for a trustee's general avoidance powers with respect to postpetition transactions:

> Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate–
>
> > (1) that occurs after the commencement of the case; and
> >
> > (2)(A) that is authorized only under section 303(f) or 542(c) of this title; or
> >
> > (B) that is not authorized under this title or by the court.

11 U.S.C. § 549(a).

States for the refund of federal income taxes claimed on the amended return.[14]

The Trustee also contemporaneously filed suit against the Debtors' common parent corporation, asserting Maryland's liability to the Debtors' estate for the relinquished carryback of the Debtors' NOLs. On December 12, 1991, the Trustee entered into a settlement agreement ("Settlement") addressing claims by and against various creditors, including the Trustee's suit against Maryland. The Settlement noted that "[t]he IRS has not yet approved or denied" the tax refund claim filed in May of that year, but it provided for distribution among the creditors, including Maryland, of any proceeds resulting from the claim. Maryland agreed to "take no action to prevent or impair the Trustee" from collecting the full amount of the refund on behalf of the Debtors' estate. On September 24, 1992, however, the IRS sent the Trustee notice of disallowance, stating that the tax refund claim had not been proven valid and that any refund suit would have to be filed within two years from the mailing date of the letter.

After the Trustee initiated a second adversary proceeding for the tax refund in January, 1993, *see* note 6, *supra*, both the government and the Trustee moved for summary judgment. In April, 1994, the bankruptcy court granted summary judgment in favor of the Trustee. On appeal, the district court vacated and remanded, ruling that Maryland should have been joined as a party

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[14] The bankruptcy court initially dismissed this complaint without prejudice in December 1992, but later reinstated the action in June 1993 upon the Trustee's motion for reconsideration. In the interim, the Trustee filed a second complaint seeking identical relief on January 12, 1993. Both adversary proceedings have since been consolidated and are herein treated as a single case.

under Federal Rule of Civil Procedure 19(a). The Trustee subsequently filed an amended complaint joining Maryland as a party to the suit. Upon cross-motions for summary judgment by the Trustee and the government, the bankruptcy court once again ruled for the Trustee and granted the tax refund on behalf of the Debtors' estate. In so doing, the bankruptcy court rejected the government's argument that the Trustee's action was time-barred by 11 U.S.C. § 549(d). The district court affirmed the decision of the bankruptcy court, and the United States filed timely notice of appeal. We have jurisdiction under 28 U.S.C. § 158(d), and we reverse.

II. STANDARD OF REVIEW

This court reviews the district court's decision on an appeal from a bankruptcy court de novo. *See Preblich v. Battley*, 181 F.3d 1048, 1051 (9th Cir. 1999). We also review a bankruptcy court's grant of summary judgment de novo. *See In re Filtercorp, Inc.*, 163 F.3d 570, 578 (9th Cir. 1998).

III. DISCUSSION

The government contends that the Trustee's authority under 11 U.S.C. § 549 does not allow her to avoid the Debtors' consent to the filing of a consolidated tax return and Maryland's election to relinquish the carryback period with respect to the Debtors' NOLs, which are "irrevocable" under the IRC. Although this court has recently addressed the apparent conflict between an "irrevocable" election under 26 U.S.C. § 172(b)(3) and a trustee's broad avoidance powers under Bankruptcy Code § 548 (dealing with fraudulent transfers), *see United States v. Sims* (*In re Feiler*), 218 F.3d 948, 956-57 (9th Cir. 2000) (holding that an irrevocable election under § 172(b)(3) of the IRC is nonetheless avoidable

when the requirements of a fraudulent transfer under § 548 have been met), we need not address the analogous issue here. Because we conclude that the Trustee's ability to exercise her avoidance authority is barred by the statute of limitations under 11 U.S.C. § 549(d), we do not reach the merits of her refund claim.

A. Applicability of 11 U.S.C. § 549(d)

Section 549(d) of the Bankruptcy Code states:

> An action or proceeding under this section may not be commenced after the earlier of - -
>
> (1) two years after the date of the transfer sought to be avoided; or
>
> (2) the time the case is closed or dismissed.

11 U.S.C. § 549(d). The Trustee contends that her action is for the recovery of a tax refund pursuant to 26 U.S.C. § 7422 and therefore is governed by the statute of limitations for such suits, not by the two-year limitations period of § 549(d). The IRC includes two limitations periods for refund actions, one for filing an administrative claim and one for filing a suit for refund. When a taxpayer claims a refund from the carryback of a NOL, the taxpayer must file an administrative claim within three years from the due date for filing the return for the taxable year of the NOL. *See* 26 U.S.C. § 6511 (d)(2). The taxpayer must then file a suit for refund within two years from the date the IRS mails a notice of disallowance of the claim by certified or registered mail. *See* 26 U.S.C. § 6532(a).

In this case, the government concedes that the Trustee timely filed an administrative claim for recovery of a tax refund on May 24, 1991, and timely filed suit for a refund once the IRS mailed a notice of disallowance on September 24, 1992. The government points out, however, that, although the Trustee may have brought a timely tax refund suit, recovery of the refund is predicated upon exercise of her avoidance powers pursuant to 11 U.S.C. § 549. Unless the Trustee can avoid the Debtors' consent to the filing of a consolidated tax return and Maryland's election to relinquish the carryback period for the Debtors' NOLs, there is no basis for a tax refund based on those NOLs for the Debtors' estate. The statute of limitations applicable to refund actions, according to the government, is thus relevant only if the Trustee first can avoid, pursuant to § 549, an otherwise irrevocable election made under the provisions of 26 U.S.C. § 172.

The Trustee maintains that because this suit is an action for recovery of a tax refund under 26 U.S.C. § 7422 - - not an action to recover a postpetition transfer pursuant to the bankruptcy laws - - she cannot be barred by the statute of limitations under Bankruptcy Code § 549(d). Relying on *Gibson v. United States* (*In re Russell*), 927 F.2d 413 (8th Cir. 1991), the Trustee attempts to characterize her entire action as one for a tax refund and consequently to demonstrate the inapplicability of the § 549(d) time limitation. *See id.* at 417 ("The theory underlying the refund suit may involve a § 549 unauthorized post-petition transfer, but that does not make it a § 549 suit, and therefore § 549's statute of limitations is inapplicable."). We do not find such reasoning persuasive.

[1] The Trustee's action involves two distinct steps - - first, avoidance of the Debtors' consent to the consolidated return and

of Maryland's election to relinquish the NOLs via § 549; and second, recovery of a tax refund for the bankruptcy estate based on those NOLs under § 7422. In other words, the claim for a refund is futile unless the Trustee is successful in her affirmative claim to avoid the transfer under § 549.[15] *See id.* at 419 (Gibson, J., dissenting) ("The critical failing of the court's argument is that a necessary predicate for the tax refund suit is the trustee's attempt to avoid the taxpayer's election to carry forward net operating losses. Without avoidance of this election, there is no tax refund claim."); *cf. Smith v. Mark Twain Nat'l Bank*, 805 F.2d 278, 292-94 (8th Cir. 1986) (holding that a certificate was not subject to turnover under 11 U.S.C. § 542 unless the trustee first exercised his avoidance powers under 11 U.S.C. § 549, and indicating that, absent estoppel, the § 549(d) statute of limitations would have been applicable).

[2] Because this action cannot be characterized as one only for a tax refund when the refund claim itself is predicated

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[15] Because the tax refund claim here is predicated upon an affirmative claim of avoidance under § 549, this case is easily distinguishable from *Committee of Unsecured Creditors v. Commodity Credit Corp.* (*In re KF Dairies, Inc.*), 143 B.R. 734 (9th Cir. BAP 1992). That decision held that 11 U.S.C. § 502(d) operates to disallow claims of transferees who do not surrender an avoidable transfer, even though the grounds for claim objection may be furnished by an avoidance cause of action that would otherwise be time-barred under § 549(d). *Id.* at 737 ("The time-bar language in section 549(d) appears to contemplate application only to adversary proceedings seeking affirmative relief. Application of the time-bar to objections based on section 502(d) would undercut . . . the general rule that statutory time-bars are inapplicable to matters of defense, where no affirmative relief is sought.").

upon the Trustee's affirmative exercise of her avoidance powers, the statute of limitations of § 549(d) is applicable here. Nor do considerations of public policy suggest otherwise once the avoidance claim and the refund claim are conceptually untangled. The two claims are separate and distinct, except that in this case the latter is predicated upon the validity of the former. Although the Debtors' estate's tax refund depends upon the Trustee's avoidance of the antecedent consent and election, we do not have license to conflate the two claims by applying the statute of limitations from the IRC to the Trustee's exercise of her authority under the bankruptcy laws.

B. Trustee is time-barred from exercising her avoidance powers

[3] Under § 549(d), the Trustee had two years from the date of the "transfer sought to be avoided" to commence an avoidance proceeding. She initiated the first adversary proceeding on September 24, 1991. The bankruptcy court found that the consolidated tax return was filed on September 19, 1989, the date it was received by the IRS.[16] Because the Trustee did not commence an action to exercise her avoidance powers until September 24, 1991 - - more than two years after the transfer, *i.e.*, the date the return was filed, on September 19, 1989 - - the action is barred by the limitations period of § 549(d).

1. *Waiver*

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[16] The government asserts that the return was filed, and hence the transfer occurred, on the date that the return was sent by certified mail to the IRS, September 14, 1989. Because use of the later date of September 19 results in a decision in the government's favor, we need not address this assertion.

The Trustee contends on appeal that the date of filing under the IRC is not necessarily the same as the date of transfer for the purposes of 11 U.S.C. § 549(d). Relying on *Spear v. CEMA Distrib.* (*In re Rainbow Music, Inc.*), 154 B.R. 559, 561-62 (Bankr. N.D. Cal. 1993), which held that a check is not transferred for purposes of § 549 until is it honored, the Trustee argues that the tax return was not transferred as a matter of law until it was received and processed by the IRS. As the Trustee notes, the government did not offer any evidence below as to when it actually processed the consolidated tax return relinquishing the carryback period for the Debtors' NOLs. There is no indication in the record, however, that the Trustee presented this argument before either the bankruptcy court or the district court. We therefore find the argument waived and express no view as to its merit. *See Alexopulos v. Riles*, 784 F.2d 1408, 1411 (9th Cir. 1986) (holding that plaintiff's tolling argument was waived for failure to raise the issue in opposition to summary judgment even though the general statute of limitations issue had been briefed).

This court has recognized that "absent exceptional circumstances, we generally will not consider arguments raised for the first time on appeal, although we have discretion to do so." *El Paso City v. America West Airlines, Inc.* (*In re America West Airlines, Inc.*), 217 F.3d 1161, 1165 (9th Cir. 2000). Exceptional circumstances exist when: (1) review will prevent a "miscarriage of justice"; (2) a change in the law raises a new issue pending appeal; and (3) "the issue presented is purely one of law and either does not depend upon the factual record developed below, or the pertinent record has been fully developed." *Marx v. Loral Corp.*, 87 F.3d 1049, 1055 (9th Cir. 1996). None of these exceptional circumstances exists here. Although determination of the appropriate date of transfer from which to measure the limitations period under § 549(d) is purely a matter of law, the factual record

has not been developed below as to when the tax return was actually processed. Because the United States would be prejudiced by not having had the opportunity to so develop the record if we were to entertain the Trustee's new argument on appeal, this case is not appropriate for such exercise of our discretion. *See United States v. Gabriel*, 625 F.2d 830, 832 (9th Cir. 1980) ("This exception necessarily applies only when the party against whom the issue is raised would not be prejudiced and would not have tried his case differently either by developing new facts in response to or advancing distinct legal arguments against the issue.").

2. *Equitable Estoppel*

[4] The principles of equitable estoppel do not prevent the government from asserting that the Trustee's exercise of her avoidance powers is barred by the statute of limitations under § 549(d). The Trustee points to two communications from the government in arguing for estoppel: (1) the September 17, 1991, letter stating that the Trustee's return had been accepted as filed; (2) the September 24, 1992, notice of disallowance stating that the Trustee had two years from the date of mailing to file suit. Neither communication supports a finding of equitable estoppel.

[5] With respect to the letter of September 17, 1991, the IRS properly considered the Trustee's amended return as a claim for a refund but did not address the separate and distinct avoidance claim upon which the refund action was necessarily predicated. Moreover, an informal letter from the IRS that a return has been accepted as filed has no conclusive bearing on whether a claim for a refund is ultimately granted. *See Shumaker v. Commissioner*, 648 F.2d 1198, 1199-1200 (9th Cir. 1981) ("Neither the informal acceptance of Shumaker's amended returns

nor the adjustments to his tax crediting him with the amount in controversy constitute a binding agreement under the tax laws."). This understanding would appear to be confirmed by language in the subsequent Settlement entered by the Trustee on December 12, 1991, which noted that "[t]he IRS has not yet approved or denied" the tax refund claim.

[6] The Trustee, however, points to cases holding that taxpayers may rely on the written, and even oral, representations of IRS employees. *See, e.g., Haber v. United States*, 831 F.2d 1051, 1053-54 (Fed. Cir. 1987) (taxpayer had right to rely on IRS oral representation to taxpayer's accountant that prior notice of disallowance had been withdrawn, so that later notice of disallowance initiated period for filing refund suit). There is nothing in the record here, however, to suggest that the Trustee actually relied upon the letter of September 17 in deciding not to file suit before September 19 - - when the two year statute of limitations under § 549(d) expired - - but nevertheless deciding to file suit a week later on September 24, 1991. *See Watkins v. United States Army*, 875 F.2d 699, 709 (9th Cir. 1989) (en banc) (noting requirement that party seeking estoppel is required to show that he relied to his detriment on conduct of the party that is to be estopped). Similarly, the Trustee could not possibly have relied on the September 24, 1992, notice of disallowance in missing the deadline for claiming avoidance under § 549 when that letter was sent more than a year after the deadline had passed (because, of course, that notice referred solely to the refund claim, as opposed to the predicate avoidance claim that was already barred). For the foregoing reasons, we conclude that equitable estoppel does not apply.

IV. CONCLUSION

The Trustee's tax refund claim under 26 U.S.C. § 7422 is predicated upon the exercise of her avoidance powers pursuant to 11 U.S.C. § 549. Because she cannot satisfy the § 549(d) statute of limitations, which governs avoidance actions, she is time-barred from exercising that authority. We therefore reverse the district court's judgment with directions that it reverse the bankruptcy court's grant of summary judgment in favor of the Trustee and remand with directions to enter judgment in favor of the government.

REVERSED and REMANDED.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 98-16631
CT/AG#: 97-02485-WKU
CT/AG#: 97-02486-WKU

IN RE:

HOME AMERICA T.V.-APPLIANCE AUDIO, INC.,

Debtor

UNITED STATES OF AMERICA

Appellant

v.

WENDA K. SHALTRY; MARYLAND INVESTMENTS

Appellees

APPEAL FROM the United States District Court for the District of Arizona (Phoenix).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Phoenix) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is REVERSED AND REMANDED.

Filed and entered November 15, 2000

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In Re: HOME AMERICA T.V. -APPLIANCE AUDIO, INC. AUDIO, INC. Debtor.	No. 98-16631 DC No. CV 97-02485-WKU
UNITED STATES OF AMERICA Appellant, v. WENDA K. SHALTRY; MARYLAND INVESTMENTS, Appellees.	**ORDER** [File Stamp reads as follows: FILED Jan 22, 2001 Cathy A. Catterson Clerk U.S. Court of Appeals]

Before: ALARCON, TASHIMA, and SILVERMAN, Circuit Judges.

The petition for remand or in the alternative, rehearing, is denied.

Gerald L. Shelley, No. 010453
Benjamin R. Norris, No. 011286
QUARLES & BRADY
One East Camelback Road
Suite 400
Phoenix, Arizona 85012-1649
(602) 230-5500

Attorneys for Wenda K. Shaltry, Trustee

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re	) Chapter 7
	)
	) Case No. B-89-8322-PHX-RTB
HOME AMERICA T.V.-APPLIANCE-AUDIO, INC.,	)
	)
Debtor.	)
In re	) Chapter 7
	)
	) Case No. 91-13795-PHX-RTB
J.G. BOYD T.V.-APPLIANCE-AUDIO, INC.,	)
	)
Debtor.	)
In re	) Chapter 7
	)
	) Case No. 91-13796-RTB
CHARLESTON T.V. & APPLIANCE COMPANY,	) Adv. No. 91-896

) Adv. 93-21
)
Debtor.) JUDGMENT
_____)

For the reasons set forth in the Court's Minute Entry Order dated November 19, 1997, the Court hereby grants a judgment determining that the Trustee is entitled to recover from the United States the principal amount of $1,610,761 sought by the Trustee in this action, together with interest thereon as provided by statute, and determining that the Trustee is entitled to the declaratory relief sought against Maryland Investments. Each party is to bear its own costs, including but not limited to its respective attorneys fees.

DATED this 9th day of January, 1998.

By: /s/
Redfield T. Baum
U.S. Bankruptcy Court Judge

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

MINUTE ENTRY ORDER

FOR MATTER TAKEN UNDER ADVISEMENT

Bankruptcy Judge:	Hon. Redfield T. Baum
Case Name:	Home America, T.V., Appliance-Audio Chapter 7
Case No.:	B-89-08322-PHX-RTB
Adversary Name:	Wenda Shaltry vs. Internal Revenue Service
Adversary No.:	91-00896 93-00021
Subject of Hearing:	Trustee's Motion For Summary Judgment Against Maryland Investments & Renewed Motion For Summary Judgment Against Defendant U.S.A.; Motion to Dismiss filed by U.S.A.
Date Matter Taken Under Advisement:	August 13, 1997
Date Ruled Upon:	November 19, 1997

In this adversary proceeding, the chapter 7 trustee seeks to void the election, made a few days after the filing of involuntary petitions against these debtors, by the debtor corporations and their parent corporation to file consolidated tax returns thereby allowing the non-debtor parent corporation the tax benefit of the large, net operating loss deductions of the debtor corporations. By voiding the election, the estates will receive a tax refund of more than $1,600,000.00. The Internal Revenue Service asserts that the election once made is irrevocable, that the action was not filed timely and that because this court can not provide adequate relief under F.R.C.P. 19 and Bankruptcy Rule 7019, the trustee should be denied any relief. For the reasons stated below, the trustee is granted summary judgment.

THE FACTS

The following facts are essentially undisputed. On September 6, 1989, involuntary chapter 7 petitions were filed against these debtors. Thirteen days later, the parent corporation of these debtors, Maryland Investments, Inc. ("Maryland") filed consolidated tax returns with the Internal Revenue Service ("IRS") deducting from

their income the net operating losses ("NOL") of the debtors in that return. The Internal Revenue Code makes the election to claim and so use the NOL irrevocable. At this time no chapter 7 trustee had been appointed for these debtors. The very next day, September 20, 1989, the chapter 7 trustee was appointed for these debtors.

On May 24, 1991, the trustee filed amended tax returns for the debtors asserting that as a chapter 7 bankruptcy trustee the election by Maryland and the debtors could be voided and claiming a refund of more than $1,600,000.00. Essentially, the trustee amended the 1986, 1987 and 1989 returns, carrying back the NOL created refunds for tax years 1986 and 1987. The trustee requested a prompt determination pursuant to Section 505 of the Bankruptcy Code (11 U.S.C. 505).

On September 17, 1991, the IRS wrote to the trustee stating, "In reply to your request for prompt audit of the income tax return identified above (tax years 1986, 1987 and 1989), we are pleased to tell you your return has been accepted as filed." On November 4, 1991, in response to the trustee's inquiry, the IRS wrote to the trustee stating "It is difficult to say precisely how long it will be until you

receive the refunds. I am estimating a minimum of six months." Then in December, the IRS notified the trustee that it was going to examine the 1986 and 1987 returns. In February 1992, the IRS wrote stating that it did have all needed information but was waiting legal guidance "on the technical matter on this claim." The IRS also stated that it may need "an extension" without specifying from what deadline. Then in April 1992, for the first time, the IRS indicated that the refund might be disallowed. Finally in September 1992, the IRS issued its standard letter of disallowance and stating that the trustee had two years to file a refund suit.

In December 1991, while the foregoing proceedings involving the refund claim by the trustee were ongoing, Maryland, the trustee, and the other major creditors in these chapter 7 bankruptcy cases settled their numerous claims and disputes. That settlement was noticed to all creditors and approved by the bankruptcy court. This settlement agreement covered far more than the parties rights in the tax refund claim sought by the trustee. However, the refund claim was part of the agreement. The agreement expressly provided how any monies from that refund

claim would be distributed to the debtors' creditors, including Maryland. Paragraph 9 of that agreement stated:

> "No Opposition to Tax Refund Claim
> Prior to distribution to Chrysler of its share of the proceeds from the Tax Refund Claim as provided in Section 2 hereof, Maryland agrees that it will take no action to prevent or impair the Trustee from collecting on behalf of the Home America Estates the full amount claimed in the Tax Refund Claim. Except as otherwise provided in the immediately preceding sentence, nothing herein shall be construed to prevent Maryland from setting forth its audit position to IRS auditors if the IRS initiates an audit of Maryland's return, or in tax deficiency proceedings, other than in Bankruptcy Court, following therefrom"

The trustee filed two adversary actions against the IRS seeking the tax refund. The first was filed on September 24, 1991 and the second was filed on January 12, 1993. The first action was not initially pursued by the trustee presumably because when it was filed the IRS was telling the trustee that the refund would be paid. Initially that case was dismissed but later reinstated and consolidated with the second adversary. Maryland was not a party to these actions. After summary judgment was entered by the this court for the trustee, an appeal was taken to the district court. The district court vacated the judgments concluding that, as asserted by the IRS, Maryland was a necessary party to this litigation.

As directed by the district court, the trustee filed an amended complaint naming Maryland as an additional defendant. The relief sought as to Maryland was a determination that the trustee's amended tax returns were proper and that the trustee validly voided the tax elections. Maryland, now a party does not oppose that relief. Both parties have again moved for summary judgment and the IRS also moved to have the complaint dismissed.

THE IRS'S MOTION TO DISMISS

Considering first the IRS's motion to dismiss, the IRS asserts that with the addition of Maryland as a party, this court can not fashion a remedy which affords complete relief to the IRS and because the election to file consolidated returns is irrevocable under the Internal Revenue Code the complaint fails to state a claim upon which relief can be granted. Specifically, the IRS asserts that the amended complaint adding Maryland fails to seek any meaningful relief against Maryland thus leaving the IRS in the position of having two taxpayers using the NOL to reduce their taxes. The IRS then claims that under F.R.C.P. 19(b) this action should be dismissed because the bankruptcy court lacks jurisdiction to require Maryland

to amend its returns or otherwise return the tax benefits it received from the NOL. The service also asserts that it had no procedural ability to join Maryland in this action and that it is now time barred from assessing any taxes against Maryland. The IRS thus concludes and asserts that since no effective relief can be granted here the case must be dismissed.

The IRS's request for dismissal based on F.R.C.P. 19(b) triggers the "equity and good conscience" standard for determining whether the action should be dismissed or should proceed among the parties before the court. This standard requires the analysis of four factors: (1) the extent a judgment rendered in a person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by shaping of relief, or other measures, the prejudice can be lessened or avoided: (3) whether a judgment rendered in the person's absence will be adequate; and (4) whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder. Inecon Agricorporation v. Tribal Farms, Inc., 656 F.2d 498 (9th Cir. 1981). The analysis is a

balancing test. Bakia v. County of Los Angeles, 687 F.2d 299 (9th Cir. 1982).

The first element requires a review of the extent to which any judgment might be prejudicial to any party or non-party. The IRS asserts that it will be prejudice because if the trustee recovers a tax refund based on the NOL and Maryland also gets the benefit of the NOL one deduction is being used by two different taxpayers resulting in their jointly underpaying their taxes. Simply put if the court awards the NOL to the debtors, then Maryland must be precluded from using it. Without any analysis such assertion seems to have significant merit. However, such assertion is not correct.

The trustee's CPA, after the remand from the district court, received and reviewed the tax returns for Maryland and concluded that even without the NOL Maryland has overpaid its tax obligations for the years at issue. The CPA states that if Maryland does not file a consolidated tax return with the debtors, it can use tax deductions for worthless stock and bad debt deduction relating to the debtors thereby causing its tax obligation to the IRS to be approximately $100,000.00 lower than reported in the consolidated returns actually

filed. The IRS has not controverted the CPA's claim. Therefore, the record before the court shows that the NOL is not being used twice to reduce the tax liability of both the debtors and Maryland as claimed by the IRS.

Further, there is the contractual obligation of Maryland to "take no action to prevent or impair the Trustee from collecting in the Tax Refund Claim." That requirement is in paragraph 9 of the global settlement agreement in these bankruptcy cases. The right to the use of the NOL was the entire basis for the trustee's refund claim. The no action restriction and obligation of Maryland continued until the first distribution to these creditors "of proceeds from the Tax Refund Claim." Although the agreement allowed Maryland to set "forth its audit position" to the IRS, that right was limited by the "no action to prevent or impair" language stated above. Therefore, under the settlement agreement, Maryland was (and is) contractually obligated to take no action to prevent the trustee from recovering the tax refund from the IRS. That obligation is still effected today, almost seven years after the settlement and the filing of the amended return. At any time during this period the IRS could have audited Maryland's

returns and Maryland was contractually obligated to take no action to impair the trustee's refund claim, such as claiming any right to the NOL. By this court's order approving the settlement agreement, Maryland was already under a court order regarding its obligations under that agreement. (See Docket 494). Maryland is bound by its contract and this court's order approving that contract to take no action to prevent or impair the trustee's right to recover the tax refund sought by the amended returns. For all of these reasons, the court concludes that there is no material risk that any judgment here would be prejudicial to the rights of IRS or Maryland.

For many of the same reasons, the court does not believe that any further protective measures are called for to protect any of these parties and that any judgment entered even without Maryland adequately protects all these parties. The settlement agreement and the specific provisions discussed above already provide significant protection. Assuming that the IRS had audited Maryland, disallowed it the right to the NOL, assessed it additional taxes and if Maryland filed suit and claimed that it was entitled to the NOL, the IRS could have sought appropriate relief in the bankruptcy court or that

tax/district court that under the settlement agreement Maryland had no right to claim the NOL. Finally, the IRS has provided no specific protective measures that it claims would be appropriate.

The last element, the adequacy of the trustee's alternatives, weighs heavily for not dismissing this case. If this case is dismissed, the creditors will lose $1,600,00.00. Those funds although not full payment of the creditors claims would provide a significant dividend in this chapter 7 case. Such result would be an injustice to those creditors. The record indicates that the NOL belongs to these debtors and should rightfully go to benefit these creditors. The timing of Maryland's filing of the consolidated return, thirteen days after the filing of the involuntary petition, indicates that such action was a rushed judgment in fear of suffering further losses relating to these debtors. It is probably safe to assume that such action was so rushed that it was not a carefully analyzed action because it now appears, based on the trustee's CPA's conclusions, that such action actually caused Maryland to pay more taxes than it was obligated to pay. It should also be safe to assume that taxpayers don't rush to over pay their taxes. Therefore, there does not appear to be any injustice to

the IRS, or all taxpayers, if the trustee and the creditors receive the tax refund. Because the dismissal of this case would preclude the trustee and the creditors from receiving the tax refund which rightfully belongs to them, it would be an injustice to dismiss this case and deny them that right. The trustee's lack of an alternative remedy alone even assuming the other three factors warranted a dismissal (which they don't) would preclude dismissal where the result would deny a just claim.

Lastly, the IRS requests dismissal because the Internal Revenue Code makes elections to file consolidated tax returns irrevocable and so the IRS asserts the trustee has no right to claim the NOL. This argument places the provisions of the Internal Revenue Code in conflict with the avoidance powers of the Bankruptcy Code. The Internal Revenue Code makes the election irrevocable and Section 549 of the Bankruptcy Code allows a trustee to void a post petition transfer in an involuntary case which occurred before the trustee is appointed, as happened here. The problem for the IRS and this argument is the only authority on this issue concluded that the trustee's avoidance powers under the Bankruptcy Code and the

danger of permitting a debtor to manipulate improperly the Internal Revenue Code required that a trustee have the ability to avoid a debtor's irrevocable election to carry forward net operating losses. In re Russell, 927 F.2d 413 (8th Cir. 1991).

The rationale of Russell is equally applicable here. Section 303(f) of the Bankruptcy Code allows a debtor who is the subject of an unresolved involuntary petition to continue to "use, acquire, or dispose of property" during the gap period between when an involuntary petition is filed and the order for relief is entered. The protection from the risks created by this right is the Section 549 avoidance powers granted to a bankruptcy trustee. This case and Russell show that the risk of debtors or those in control of debtors for manipulating the tax code to their benefit is a legitimate risk. Thus, construing these statutes to allow the avoidance of such elections, which would be irrevocable outside of bankruptcy, is consistent with the general policy of the Bankruptcy Code to void certain types of transfers in order to allow equality of distribution among creditors, one of the fundamental precepts of bankruptcy policy. The lack of other case authority in this area indicates that such events are not

usual even in the unusual world of bankruptcy and so the effect on the tax system is not a material factor. This court concludes that Section 549 of the Bankruptcy Code allows a chapter 7 trustee to void the election by debtors in bankruptcy to filed consolidated tax returns which would otherwise cause the bankruptcy estates and creditors to lose the tax benefits of net operating losses.

For the reasons set forth above, the court denies the IRS's motion to dismiss.

THE CROSS MOTIONS FOR SUMMARY JUDGMENT

Both parties have moved for summary judgment. The IRS moves for summary judgment claiming that the trustee's claims are barred by the statute of limitations. The argument is that no action was filed within the two year statute of limitations under Sections 546 and 549 of the Bankruptcy Code. The IRS relies on statements by the District Court in its decision to remand this case and the dissent in Russell that this is an avoidance action. Russell held that this type of action is a tax refund case, not an avoidance action and, therefore, the time to bring such action is governed by the deadlines under the Internal Revenue Code and not Section 546. The District

Court in deciding to remand this case did characterize this case as a Section 549 postpetition transfer case. However, that court remand the case requiring that Maryland be added as a party and vacated the summary judgments entered by this court. This court concludes that those statements in that decision do not limit this court authority to consider this issue.

The only precedence cited by either party on this issue is Russell. There it was held that this type of action is governed by the two year deadline for filing refund suits not the time period under Section 546 of the Bankruptcy Code. That court did not explain why it consider the case governed by the deadline for refund actions. Significantly, the IRS's own notice of disallowance stated that the trustee would have the two year time period from that notice to file any tax refund action. This court considers that significant for two reasons. First, the IRS viewed this claim as a tax refund claim with the applicable two year statute to bring a refund claim if disallowed. Second, having given that notice and provided that deadline it should be bound by that time period. See: Alltel Information Services, Inc. v. F.D.I.C., 970 F. Supp. 775 (C.D. Ca. 1997). Also, the application

of this limitation period allows the IRS to complete their review and determination of bankruptcy tax claims before requiring a bankrupt taxpayer to file an avoidance action which relates to a pending tax return. Such deadline for filing actions also avoids the problem which occurred here. During the two year period for filing avoidance actions the trustee is told by the IRS that the refund claim is allowed and will be paid. Only after the expiration of that two year period did the IRS disallow the claim. That situation would require a finding of waiver, estoppel or tolling of the two year period, if applicable. See: In re Olsen, 36 F.3d 71 (9th Cir. 1994); In re M & L Business Mach. Co. Inc., 75 F.3d 586 (10th Cir. 1996); In re Maxway Corp., 27 F.3d 980, cert. denied, 115 S. Ct. 580, 130 L.Ed.2d 495 (199). Adopting the refund time period causes no prejudice to the IRS. That deadline is the one applicable in these cases and commences when the IRS disallows a refund claim. Public policy is better served by not requiring the filing of unnecessary protective actions. There is no compelling rationale to require that these actions be filed prior to the decision to disallow such claims. For these reasons, this court concludes that this is a timely filed

refund action, not barred by the deadlines under Sections 546 or 549 of the Bankruptcy Code.

The IRS also asserts that section 505, 544, and 548 do not provide a legal basis for the trustee's request for summary judgment. This court struggles with this argument. This case was and always has been a tax refund case. The original complaint may not have referred to the correct statute number in every instance, but there can be no mistaking the nature of this case. Section 505(a)(1) of the Bankruptcy Code gives this court the jurisdiction to determine the amount of any tax, whether or not paid and whether or not contested before any judicial or administrative tribunal. Section 505(a)(2) limits that authority by: (1) not allowing such determination if such tax was contested and adjudicated by any tribunal before the commencement of the bankruptcy case or, (2) any tax refund before the earlier of 120 clays after requesting such refund or a determination by the government unit of such refund request. This statute allows this court to hear tax refund cases 120 days after the trustee requests a refund. Section 505(a) of the Bankruptcy Code vests the bankruptcy court with authority to determine any unpaid tax

liability of the debtor that has not been contested before or adjudicated by a judicial or administrative tribunal of competent jurisdiction prior to the commencement of the case under Title 11. 4 Collier on Bankruptcy Section 505.01 (15 ed. Revised). See also: Delpit v. C.I.R., 18 F.3d 768 (9th Cir. 1994); Matter of Teal, 16 F.3d 619 (5th Cir. 1994). Thus, the IRS's claim of lack of authority to hear this case falls.

The IRS also asserts that this court can not fashion a remedy to require Maryland to give up the NOL and that the amended complaint seeks insufficient relief from Maryland and, thus, the IRS argues that it is entitled to summary judgment or dismissal. In large part, the court has already consider and rejected this argument, as discussed above. Additionally, this court concludes that the amended complaint adequately asserts that the NOL belongs to the trustee and that as to Maryland this court can enter judgment accordingly, i.e., that Maryland can not claim the NOL. The IRS also asserts that the time to assess Maryland has run and, therefore, it is without any remedy. Assuming the correctness of that assertion, no one other than the IRS could assess a tax claim against Maryland. It should

also be noted that the IRS was not remediless as it claims when this court denied its original motion to join Maryland as a party to this case. The IRS could have filed a third party complaint against Maryland. It certainly seems that if the NOL belonged to the trustee then Maryland would be liable to the IRS for any tax benefits it obtained from that NOL. Any jurisdictional deficiencies could have been avoided by a motion to withdraw the reference to the district court. But as noted above apparently Maryland punished itself by over paying its taxes in its rush to claim the NOL from these debtors. Given that fact, the IRS offers no appropriate remedy it needs as to Maryland. Again, as noted previously, Maryland has already agreed to take no action to prevent or impair the trustee from collecting the tax refund claim and that agreement has been approved by a final order of this court. If Maryland were to violate that agreement, this court could take appropriate action. The bankruptcy court has the power to summarily enforce settlements. In re City Equities Anaheim, LTD., 22 F.3d 954 (9th Cir. 1994). But the reality is that still almost seven years later Maryland does not appear to be doing anything in violation of that agreement. Because under the

settlement agreement Maryland was, and still is, bound to "take no action to prevent or impair" the trustee from recovering this tax refund, it appears to this court that from December 1991 on the IRS could have assessed Maryland for any taxes it might owe because it could not use the NOL to reduce any taxes it might otherwise owe to the IRS. If Maryland had asserted the right to claim the NOL, the IRS could have requested this court to enforce Maryland's agreement not to take such action or for other appropriate relief. It is unclear to this court what further relief the IRS needs. The IRS's Rule 19 assertions are rejected again.

Lastly, the IRS claims that summary judgment must be denied because there is a question of material fact. The IRS claims that a discrepancy exists between the consolidated returns and the amended returns and that this "discrepancy" creates an issue of material fact. This factual dispute is that the losses claimed on the amended return are approximately 1.4 million more than claimed in the consolidated return. Significantly, the IRS does not say that the amended return is incorrect just that the losses claimed are larger. The court doubts that a question of fact is created by that

"discrepancy". However, the trustee's CPA, Thomas Maguire, explains that "discrepancy" in his affidavit that the debtors, as insolvent taxpayers, are not required to include the 1.4 million in debt forgiveness incurred when the debtors did not pay that debt to Maryland but this amount was included in the consolidated return. Without the consolidated returns, Maryland may claim the bad debt and lost investment deductions in determining its tax liability which tax liability is less than it paid under the prior consolidated return. Based on this record, the court concludes that there are no questions of material fact.

Although the amounts at issue are large, the core issue does not involve an issue of fact. If the trustee can revoke the election to file a consolidated return and claim the NOL in the amended return, the estate is entitled to a large tax refund. For the reasons stated above, the court concludes that this is a tax refund case timely field by the trustee, that under Section 549 the trustee can revoke the election to file a consolidated return, that the trustee is entitled to a tax refund in the amount claimed based on the trustee's right to use

the NOL and that Maryland may not claim the NOL on its tax returns.

Accordingly, the trustee is entitled to summary judgment on her claim for the tax refund.

Copy of the foregoing mailed
this 21 day of November, 1997,
to:

Paul Randolph
Office of The United States Trustee
P.O. Box 36170
Phoenix, Arizona 85067-6170

Gerald L. Shelley
Benjamin R. Norris
QUARLES & BRADY
One East Camelback Road, Suite 400
Phoenix, Arizona 85012-1649

Brian Feldman
DEPARTMENT OF JUSTICE
Tax Division, CTS Western
P.O. Box 683
Ben Franklin Station
Washington, D.C. 20044

Robert C. Van Voorhees, Esq.
BRYAN CAVE
2800 North Central Avenue
Phoenix, Arizona 85004

by /s/
Judicial Assistant

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

IN THE MATTER OF:	)	CIV-97-2485-PHX-WKU
	)	CIV-97-2486-PHX-ROS
HOME AMERICA T.V.-APPLIANCE-AUDIO, INC.,	)	BK 89-8322-PHX-RTB
	)	ADV. NO. 93-21
Debtor.	)	
UNITED STATES OF AMERICA,	)	MEMORANDUM AND ORDER ON APPELLANTS' APPEAL FROM THE BANKRUPTCY COURT
Appellant,	)	
v.	)	
WENDA K. SHALTRY, et al.,	)	
Appellees.	)	

The facts and issues in this case are set forth in the record on appeal. The standard of review in bankruptcy appeals is the clearly erroneous standard pursuant to Bankruptcy Rule 8013. I have reviewed this case de novo. I have given careful consideration to the issues in this case, and I appreciate the appellant's arguments. However, based on the facts of this case and the relevant law, I do not find that the bankruptcy court's decision was clearly erroneous.

IT IS THEREFORE ORDERED that the order of November 19, 1997, and the judgment of January 8, 1998, of United States Bankruptcy Judge Redfield T. Baum, are hereby affirmed.

Dated June 17, 1998.

BY THE COURT

/s/

United States Senior District Judge

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
JUN 29 2001
OFFICE OF THE CLERK

(2)

No. 00-1656

In the Supreme Court of the United States

WENDA K. SHALTRY, BANKRUPTCY TRUSTEE FOR HOME AMERICA T.V.-APPLIANCE AUDIO, INC., J.G. BOYD T.V.-APPLIANCE AUDIO, INC., CHARLESTON T.V. & APPLIANCE CO., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSEN
Solicitor General
Counsel of Record

CLAIRE FALLON
Acting Assistant Attorney General

THOMAS J. CLARK
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

1H 8P

QUESTION PRESENTED

Whether the relief sought in this suit is precluded by the two-year statute of limitations in 11 U.S.C. 549(d) for actions to avoid transfers of property of the debtor in a bankruptcy case.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A8-A26) is reported at 232 F.3d 1046. The opinion of the district court (Pet. App. A55) and the opinion of the bankruptcy court (Pet. App. A31-A54) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 2000. The petition for rehearing was denied on January 22, 2001. Pet. App. A29. The petition for a writ of certiorari was filed on April 20, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In early 1989, Maryland Investments, Inc., acquired the stock of Home America T.V.-Appliance Audio, Inc. (Home America) and thereby became the common parent of a consolidated group consisting of itself, Home America and the two subsidiaries of Home America. Pet App. A13; see 26 U.S.C. 1504(a). On September 6, 1989, the creditors of Home America filed an involuntary petition in bankruptcy against that corporation. Pet. App. A14. The subsidiaries of Home America were later included in these proceedings by order of the bankruptcy court. Home America and its subsidiaries are therefore referred to collectively as the "debtors." *Ibid.*

On September 14, 1989, prior to the appointment of a trustee or the issuance of an order for relief, Maryland Investments, Inc.—which was not itself a debtor in the bankruptcy case—filed a consolidated tax return with the Internal Revenue Service for itself and the debtors. Pet. App. A14. This return was filed during the period in which Home America was permitted to operate its business as debtor-in-possession under 11 U.S.C. 303(f). The debtors expressly consented to the filing of the consolidated return under 26 U.S.C. 1501. Pet. App. A14. The return, which included the items of income and deductions of the debtors for the period from April 1, 1989 to June 30, 1989, reported a net operating loss of $2.2 million. All of this loss was attributable to the operations of the debtors. *Ibid.*

2. a. During the years involved in this case, Section 172(b)(1)(A)-(B) of the Internal Revenue Code, 26 U.S.C. 172(b)(1)(A)-(B) (1988), allowed a net operating loss to be carried back as a deduction against income during the three years preceding the year of the loss

and, to the extent the loss was not fully absorbed by income in the carryback years, to be carried forward to each of the fifteen years following the year of the loss. 26 U.S.C. 172(b)(1)(A)-(B) (1988).[1] Under Section 172(b)(3) of the Internal Revenue Code, a taxpayer may, for any tax year, elect to relinquish the carryback period and instead only carry the net operating loss for that year forward. 26 U.S.C. 172(b)(3). Once made, that election is "irrevocable for such taxable year. *Ibid.*

b. On the consolidated return filed by Maryland Investments, Inc., the taxpayers elected under 26 U.S.C. 172(b)(3) to relinquish the carryback period for the net operating loss reported on that return. That loss was instead used in the computation of the tax liability of Maryland Investments, Inc., for the carryforward periods ending December 31, 1989, and December 31, 1990.

3. On September 20, 1989, petitioner was appointed trustee of the Chapter 7 bankruptcy proceeding. Pet. App. A35. On May 24, 1991, petitioner filed an amended return on behalf of the debtors for the tax year ending June 30, 1989—which included the period for which the debtors had joined in the consolidated return filed on September 14, 1989, by Maryland Investments, Inc. *Id.* at A14-A16. On the amended return, petitioner sought to carry back to 1986 and 1987 the net operating loss that the debtors had incurred during the year ending June 30, 1989. That net operating loss, however, had already been used by Maryland Investments, Inc., to offset its income for the taxable periods ending December 31, 1989 and December 31, 1990. The belated attempt of petitioner

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[1] The carryback period is currently two years, and the carryforward period is twenty years.

to carry back this net operating loss—and thereby to disavow the "irrevocable" election made by the debtors under Section 172(b)(3)—gave rise to a refund claim of more than $1.6 million for the 1986 and 1987 tax years of the debtors. Pet. App. A16, A35.

In submitting the amended return, petitioner contended that the consent of the debtors to be included in the consolidated return, and the election that they made under Section 172(b)(3) to forgo the carryback of their net operating loss, constituted an improper "transfer of property of the estate * * * after the commencement of the [bankruptcy] case" that should be voided under Section 549(a) of the Bankruptcy Code, 11 U.S.C. 549(a). Pet. App. A16 n.13, A35.[2] Petitioner requested an audit of the amended return under Section 505(b) of the Bankruptcy Code, 11 U.S.C. 505(b).[3] On September 17, 1991, the Internal Revenue

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[2] Section 549(a) of the Bankruptcy Code authorizes the trustee to avoid a postpetition "transfer of property of the estate." 11 U.S.C. 549(a). Section 548(a)(1) of the Code similarly authorizes the trustee to avoid a "transfer of an interest of the debtor in property" that was made within one year before the date of the filing of the petition if the transfer was in fraud of the debtor's creditors. 11 U.S.C. 548(a)(1). The United States does not agree that an election under Section 172(b)(3) of the Internal Revenue Code to relinquish the carryback period for a net operating loss is a transfer of "an interest of the debtor in property" or of "property of the estate" within the scope of Sections 548 and 549. Two courts of appeals, however, have held to the contrary. See *In re Feiler*, 218 F.3d 948, 955-956 (9th Cir. 2000); *In re Russell*, 927 F.2d 413 (8th Cir. 1991). In the present case, the court of appeals did not reach this underlying issue because it concluded that the statute of limitations had run on petitioner's claim. See Pet. App. A19.

[3] Section 505(b) establishes deadlines for audits with respect to "any tax incurred during the administration of the case."

Service informed petitioner that "your return has been accepted as filed." Pet. App. A16.

4. On September 24, 1991, petitioner commenced an action in the bankruptcy case to avoid the debtors' consent to join in the consolidated return, to avoid their election to relinquish the carryback period and to recover $1.6 million of taxes from the United States. Pet. App. A20-A21. Petitioner also filed suit against Maryland Investments, Inc., to recover the tax benefits that the company obtained from its use of the loss carryforwards from the debtors' operations. *Id.* at A17. On December 12, 1991, petitioner settled its suit against Maryland Investments, Inc. *Ibid.*[4]

Petitioner filed a motion for summary judgment in the action against the government. Pet. App. A17. The government argued that the avoidance powers conferred upon trustees by the Bankruptcy Code do not empower trustees to avoid elections that are made irrevocable by the Internal Revenue Code. *Id.* at A44-A45; see also note 2, *supra*. The government also argued that the consent and election made by the debtors could not be voided because the two-year limitations period under Section 549(d)(1) expired ten days before petitioner commenced this adversary proceeding on September 14, 1991. Pet. App. A46-A47. The government also moved for dismissal because petitioner had failed to join an indispensable party to this case (Maryland Investments, Inc.). *Id.* at A17.

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11 U.S.C. 505(b). That provision is inapplicable to this case because the tax years involved here predated the bankruptcy case.

[4] Maryland Investments, Inc., was a creditor of the debtors in the bankruptcy case. The settlement agreement entered into between the trustee and Maryland Investments, Inc., provided for Maryland Investments, Inc., to share in any proceeds from the tax refund claim of the debtors. Pet. App. A17.

The bankruptcy court granted petitioner's motion for summary judgment, but the district court reversed. Without reaching any other grounds, the district court held that Maryland Investments, Inc., was an indispensable party that must be joined in the action. Pet. App. A17-A18. On remand, petitioner filed an amended complaint that joined Maryland Investments, Inc., as a defendant. In the amended complaint, petitioner sought (i) a declaration voiding the debtors' consent to join in the consolidated returns with Maryland and voiding their election to forgo carrying back the net operating loss and (ii) a tax refund of $1.6 million from the United States. *Id.* at A20-A21.

The bankruptcy court granted petitioner's motion for summary judgment on the amended complaint. The court held that "the Trustee is entitled to the declaratory relief sought against Maryland Investments" and to the resulting tax refund sought from the United States. Pet. App. A32. The district court affirmed in a brief order that stated that it did not find the bankruptcy court's decision to be "clearly erroneous." *Id.* at A55.

5. The court of appeals reversed. Pet. App. A8-A26. The court emphasized that petitioner's action involves two distinct steps: first, petitioner seeks to avoid the debtors' consent to join in the consolidated return and Maryland's "irrevocable" election to relinquish the carryback period for the net operating loss; second, if successful in avoiding these prior actions of the debtors (and thereby revoking their "irrevocable" election), petitioner seeks a tax refund based on the carryback of the net operating losses. *Id.* at A20-A21. The court pointed out that "the claim for a refund is futile unless the Trustee is successful in her affirmative claim to avoid the transfer under § 549." Pet. App. A21. The

first claim, on which petitioner must succeed to pursue the second, is barred, however, because it was not commenced within two years from the date of the purported transfer, September 19, 1989. *Id.* at A22.[5] Because the trustee waited more than two years after the purported transfer to commence an action to exercise her avoidance powers, the court held that "the action is barred by the limitations period of § 549(d)." Pet. App. A22.

ARGUMENT

The narrow question presented in this case has arisen only twice in any litigation of which we are aware.[6] Although the two appellate decisions that have confronted this question have reached conflicting results, the conflict between these circuits is not yet irreconcilable.[7] In view of the narrowness of the question

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[5] As discussed above, the "transfers" in question are (i) the debtors' consent to join with Maryland in filing a consolidated return and (ii) the taxpayers' election under 26 U.S.C. 172(b)(3) to relinquish the carryback period for the net operating losses reported on the return. The government maintained that these "transfers" were made on September 14, 1989—the date that the consolidated return was mailed to the Internal Revenue Service. See 26 U.S.C. 7502(a). Petitioner maintained, however, that the transfers were made on September 19, 1989, the date that the return was received by the Service. The court of appeals found it unnecessary to resolve that dispute because, under either view of the facts, petitioner's avoidance claim was untimely under Section 549(d)(1). Pet. App. A22 n.16.

[6] Aside from the present case and the Eighth Circuit's contrary decision in *In re Russell*, 927 F.2d 413 (1991), we are not aware of any other decision—by any court of appeals, district court or bankruptcy court—that has discussed or ruled on this narrow statute of limitations issue.

[7] In view of the dissenting opinion of Judge Gibson in *In re Russell*, 927 F.2d at 419, and the recent conflicting decision of the

presented, and the rarity of the cases in which it is presented, review by this Court does not appear warranted at this time.[8]

1. Section 549(d)(1) of the Bankruptcy Code specifies that an action to avoid a postpetition transfer must be commenced within two years from "the date of the transfer sought to be avoided." 11 U.S.C. 549(d)(1).[9] Petitioner sought in this action to avoid the debtors' consent to file a consolidated return and their election to relinquish the carryback period for the net operating loss reported on that return. While the tax return on which the consent and election were made was filed on September 14, 1989, petitioner did not commence this action until more than two years later—on September 24, 1991. The court of appeals thus correctly held that petitioner's action to avoid the consent and elections as unauthorized postpetition "transfers" of the debtors' property is barred by the plain text of Section 549(d)(1). Pet. App. A22. See also note 5, *supra*.

Ninth Circuit in this case, the Eighth Circuit may rehear the issue en banc if it is presented again in that circuit.

[8] The question presented in this case is not likely to recur with any frequency because trustees have two years to bring an avoidance action under Section 549(d)(1) and there is rarely any valid reason for a trustee to delay prompt compliance with this deadline.

[9] Petitioner contends (Pet. 22) that the two-year limitation period set forth in 11 U.S.C. 549(d) is not absolute, and is subject to equitable tolling. Petitioner has failed, however, to show any extraordinary circumstances that would justify tolling. To the contrary, it is clear, as the court of appeals concluded, that nothing prevented petitioner from filing a timely avoidance action under 11 U.S.C. 549(a) within the period of limitations. See Pet. App. A24-A25. This equitable tolling claim is, in any event, inherently factual, does not involve any conflict among the circuits, and does not warrant review by this Court.

Petitioner nonetheless contends (Pet. 14) that this action is not governed by the two-year limitations period in Section 549(d)(1) because this is a tax refund suit rather than a suit to avoid a postpetition transfer. As the court of appeals explained, however, petitioner actually and necessarily sought *two* forms of relief. First, she sought to avoid a "transfer" of estate property, pursuant to Section 549(a) of the Bankruptcy Code. Second, if that relief were obtained, she then sought a refund of income tax pursuant to 26 U.S.C. 7422(a). She is not entitled to the second form of relief (the tax refund) unless she is first able to avoid the "transfer" under Section 549(a). By the time that petitioner filed this action, however, she was barred from obtaining the first form of relief because the limitations period set forth in Section 549(d) had expired. Because petitioner did not file a timely action to avoid the transfer, she lacked any legal basis upon which to assert a claim for a tax refund. Pet. App. A21.

2. The Eighth Circuit reached a contrary result on an indistinguishable set of facts in *In re Russell*, 927 F.2d 413 (1991). In that case, the panel majority held that the tax refund statute of limitations was controlling because the trustee had filed a suit seeking a tax refund. *Id.* at 417. As the dissenting judge in that case explained, however, the panel majority in *In re Russell* failed to recognize that, before obtaining a tax refund, the trustee first needed to succeed in his avoidance action (*id.* at 419 (Gibson, J., dissenting)):

> The critical failing of the court's argument is that a necessary predicate for the tax refund suit is the trustee's attempt to avoid the taxpayer's election to carry forward net operating losses. Without avoidance of this election, there is no tax refund claim.

Because the trustee was barred by the statute of limitations from bringing an action to avoid the transfer under Section 549 of the Bankruptcy Code, he had no valid claim for a tax refund. *Ibid.*[10]

The same is true in the present case. Unless the consent of the debtors to participate in the consolidated return and their joint election to relinquish the carryback period for the net operating loss reported on that return are avoided as improper "transfers" under Section 549(a), petitioner has no valid basis for asserting a cause of action for a refund of taxes. The statute of limitations for tax refund claims is thus immaterial to the present case: the trustee cannot prevail *on the merits* of the tax refund claim because the statute of limitations on avoidance actions precludes her effort to rescind the consents and elections that she challenges under Section 549.[11]

3. Petitioner belatedly argues (Pet. 24) that the filing of the consolidated return by Maryland Investments, Inc., after the commencement of the bankruptcy case violated the automatic stay and that the consents

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[10] Petitioner contends (Pet. 17) that this approach will require a trustee in many instances to file two separate proceedings. Although this may be so in some cases, petitioner still is not entitled to a refund unless she succeeds in her avoidance action. The fact that a trustee may have to file two actions, first an avoidance action, and second a refund suit if the avoidance action is successful, only ensures that the refund claim will not go forward unless the trustee is entitled to avoid a debtor's election. Petitioner claims (Pet. 18-19) that this two-step process may be impossible because the avoidance action may be pending even as the period of limitation for refund claims expires. Petitioner, however, could file a protective refund claim.

[11] For the reasons we have explained, the fact that the panel majority in *Russell* reached a contrary result does not warrant review by this Court at this time. See page 7 & note 7, *supra*.

and elections set forth in that return are therefore void. That issue was first raised by petitioner in her petition for a writ of certiorari. It is therefore not properly before the Court. See *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Moreover, in the brief that petitioner filed in the court of appeals (Br. 26 n. 10), she took precisely the opposite position and stated that she was *not* asserting any violation of the automatic stay "because the debtor nominally joined in the tax return and elections voluntarily."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSEN
Solicitor General

CLAIRE FALLON
Acting Assistant Attorney General

THOMAS J. CLARK
Attorney

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(3)

Supreme Court, U.S.
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No. 00-1656

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2000

WENDA K. SHALTRY, BANKRUPTCY TRUSTEE FOR HOME AMERICA T.V.-APPLIANCE AUDIO, INC., J.G. BOYD T.V.-APPLIANCE AUDIO, INC., AND CHARLESTON T.V. & APPLIANCE CO.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

July __, 2001

John J. Dawson (Counsel for the Petitioner)
Gerald L. Shelley (Of Counsel for the Petitioner)
Benjamin R. Norris (Of Counsel for the Petitioner)
QUARLES & BRADY STREICH LANG LLP
Renaissance One
Two North Central Ave.
Phoenix, AZ 85004-2391
(602) 229-5200

Ronald J. Ellett (Of Counsel for the Petitioner)
2828 North Central Avenue, Suite 1150
Phoenix, AZ 85004
(602) 235-9510

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REASONS FOR GRANTING THE WRIT

In its Brief in Opposition to the Petition, the government argues that: (a) the issue of whether petitioner and Chapter 11 bankruptcy trustee Wenda K. Shaltry's ("Shaltry") was entitled to utilize the avoidance powers in §§544-53 of the Bankruptcy Code in her 26 U.S.C. §7422 refund suit without bringing a separate avoidance action, or whether she was required to first bring an avoidance action and then subsequently litigate her tax refund claim, is narrow and uncommon, and therefore does not warrant this Court's review; (b) the conflict between the Eighth Circuit's decision in In re Russell, 927 F.2d 413 (8th Cir. 1991) and the Ninth Circuit's decision in this case do not create an irreconcilable conflict with regard to this issue; (c) the Ninth Circuit decision in Home America is correct on this issue, not the Eighth Circuit decision in Russell; and (d) Shaltry has not properly raised the issue of whether the post-petition act of Maryland Investments, Inc. ("Maryland") to consolidate itself with the Debtor for the purposes of gaining control over Home America's net operating losses was void under 11 U.S.C. §362, not merely voidable under 11 U.S.C. §549.

First, contrary to what the government claims, the issue of the appropriate procedure for bringing tax refund suits in a bankruptcy context is both a substantive procedural issue (one that is important to the interface of two separate and extensive statutory schemes, the Internal Revenue Code and the Bankruptcy Code), and one that is significant to many bankruptcy estates. The conflicts between the Eighth and Ninth Circuits on this issue are irreconcilable, and the decision of the Eighth Circuit in Russell best melds the goals of the Internal Revenue Code and the Bankruptcy Code, with an efficient judicial mechanism for resolving tax refund claims in the bankruptcy arena. Second, Shaltry did raise before the Ninth Circuit the issue of the debtor's parent corporation's post-petition consolidation with the debtor being void under 11 U.S.C.

§362, not merely voidable under 11 U.S.C. §549, so that this issue is properly before this Court.

I. The issue of whether a trustee can utilize the avoidance powers in §§544-53 of the Bankruptcy Code in a 26 U.S.C. §7422 refund suit without bringing a separate avoidance action, or whether the trustee must first bring an avoidance action and then subsequently litigate her tax refund claim, is important and warrants this Court's review.

Whether a trustee can utilize the avoidance powers in §§544-53 of the Bankruptcy Code in a 26 U.S.C. §7422 refund suit without bringing a separate avoidance action (as was held by the Eighth Circuit in Russell, at 927 F.2d 417), or whether the trustee must first bring an avoidance action and then a subsequent refund suit, each seeking the same relief (as the government argues, and as was held by the Ninth Circuit in In re Home America, at 232 F.3d 1050-51), is important and warrants this Court's review because it is now unclear what procedure a trustee or debtor-in-possession[1] must following in filing (and, if necessary, litigating) a refund claim.

The government's statement that "[t]he narrow question presented in this case has arisen only twice in any litigation of which we are aware," Brief in Opposition to the Petition, pp. 7-8, understates the importance of this issue. Regardless of how many cases have or have not dealt with this issue, bankruptcy trustees and debtors-in-possession are entitled to a clear rule on something as fundamental as the proper procedure for pursuing a federal tax refund, and a failure of this Court to provide a clear, efficient and

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[1] Pursuant to 11 U.S.C. §1107, a debtor-in-possession would face the same issues raised in this case as did Shaltry in her capacity as a Chapter 11 trustee, and so for purposes of the arguments made in the Petition and this brief, "trustee" and "debtor-in-possession" are interchangeable.

cost-minimizing rule like that adopted by the Eighth Circuit in Russell will leave bankruptcy trustees in other circuits uncertain over what course to pursue, and those in the Ninth Circuit burdened with a costly and impossible procedure.[2]

The "protection" offered by the government's suggested procedure -- implicitly adopted by the Ninth Circuit -- is wholly illusory. Even the government concedes that its proposed procedure "will require a trustee in many instances to file two separate proceedings," and that "this two-step process may be impossible because the avoidance action may be pending even as the period of limitation for refund claims expires." Brief in Opposition to the Petition, p. 10, n. 10. The sole remedy that the government suggests is as follows: "Petitioner [and, presumably, other trustees and debtors-in-possession in her position], however, could file a protective refund claim." Id.

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[2] The uncertainty created by the conflict between the procedures established by the Eighth Circuit's decision in Russell and the Ninth Circuit's decision in this case is not the same as the uncertainty that arises under a statute that is unclear as to what it forbids or requires. However, it is worth noting that at the heart of due process are the requirements that a statute clearly state the conduct forbidden or required, and that the statute provide fair notice thereof. See City of Chicago v. Morales, 527 U.S. 41, 56, 119 S.Ct.1849, 1859 (1999) (criminal statute violated due process because it was "so vague and standardless that it leaves the public uncertain as to the conduct it prohibits"; citation omitted); Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1, 12-19, 98 S.Ct. 1554, 1561-65 (1978) (due process violated by municipal utility that failed to provide notice of availability of procedure for protesting termination of service); Fuentes v. Shevin, 407 U.S. 67, 80, 92 S.Ct. 1983, 1994 (1972) (replevin statutes held to violate due process; "the central meaning of procedural due process [is that] 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified'"; citations omitted). These same concerns for certainty and fair notice weigh in favor of determining that the above-discussed issue warrants this Court's review.

The problem with the government's argument is that if, as the government contends, a successful avoidance action is a precondition to a 26 U.S.C. §7422 refund suit, Shaltry could **not** have filed a "protective" refund suit. "Protective" actions are appropriate where the plaintiff faces uncertainty over the proper locus of personal jurisdiction; a plaintiff can file "protective" actions in alternative jurisdictions while simultaneously pursuing litigation in the plaintiff's chosen forum, pending resolution of the personal jurisdiction issue in that court. See, e.g., Wheeling-Pittsburgh Steel Corp. v. Donovan Wire and Iron Co., 614 F.2d 945, 945-46 (4th Cir. 1980). However, where no subject matter jurisdiction exists, the parties cannot create subject matter jurisdiction, by agreement or otherwise. See, e.g., Sosna v. Iowa, 419 U.S. 393, 398, 95 S.Ct. 553, 557 (1975) (parties may not stipulate to the existence of subject matter jurisdiction). This is so because subject matter jurisdiction is an Article III as well as a statutory requirement. Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702, 102 S.Ct. 2099, 2104 (1982). Even the courts cannot create subject matter jurisdiction where it does not otherwise exist. Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574,583, 119 S.Ct. 1563, 1569-70 (1999).

Thus, had Shaltry followed the only course of action the government claims was available -- filing a premature "protective" 26 U.S.C. §7422 refund action, where no subject matter yet existed under 26 U.S.C. §6532 -- her refund suit would have been a nullity, and the Bankruptcy Court would have been required to dismiss, even if the government had acquiesced in Shaltry's bringing the action. As a matter of law, a "protective" action cannot be filed in a court that does not have subject matter jurisdiction **at the time the suit is filed**. See, e.g., Smith v. United States, 873 F.2d 218, 220-21 (9th Cir. 1989) (affirming dismissal of "protective action" brought under the Suits in Admiralty Act ["SIAA";46 U.S.C. §§741-52] and subject to the Clarification Act [50 U.S.C. App. §1291], where suit was filed

prematurely, before denial of administrative claim or passage of sufficient time after filing of administrative claim).

In Smith, the plaintiff filed an administrative claim with the Maritime Administration, Department of Transportation, and then filed two suits, the first a "protective" action filed before the SIAA statute of limitations for bringing suit had run (but before the time required by the Clarification Act after filing the administrative claim had elapsed), and the second after the required time from the filing of the administrative claim had lapsed under the Clarification Act, but after the SIAA statute of limitations had run. Id. at 873 F.2d 219-20. The District Court dismissed each of the two actions for lack of subject matter jurisdiction, the first for having been brought too soon after the administrative claim had been filed, and the second for having been brought after the statute of limitations had run. Id. The Ninth Circuit affirmed, following the District Court's reasoning. Id.

Here, the government's view of the law would leave bankruptcy trustees in Shaltry's position in even worse position than the plaintiff in Smith. Unlike the plaintiff in Smith (who could have avoided her dilemma by filing her claim earlier), the procedure that the government's view of the law necessarily demands – requiring the filing of two separate **and sequential** "avoidance" and "refund" actions, each seeking the same relief – gives trustees and debtors-in-possession no way of protecting themselves. On the one hand, if a trustee files a timely 11 U.S.C. §§544-53 avoidance action, unless she obtains a final, unappealable judgement in her favor within the time allowed by 26 U.S.C. §6532 – a result the government could easily avoid simply by appealing adverse decisions until the time ran out – then the trustee would be unable to bring a timely 26 U.S.C. §7422 tax refund suit. On the other hand, as Shaltry pointed out in her Petition, had she filed a premature "protective" 26 U.S.C. §7422 refund suit, the Bankruptcy Court would have been compelled to dismiss the action for lack of subject matter jurisdiction. See Petition

at pp. 17-20, citing Thomas v. United States, 755 F.2d 728, 729 (9th Cir. 1985) (holding there is no jurisdiction to hear a 26 U.S.C. §7422 refund suit, where the refund claim has not been rejected or not acted upon for six months). In short, the sole remedy proposed by the government --and implicitly adopted by the Ninth Circuit below -- is illegal and illusory.

In contrast to the absurdity and illegality of the procedure adopted by the Ninth Circuit below and now advocated by the government, the logic of the Eighth Circuit's reasoning in itsRussell decision is fair, sensible, cost-efficient, and does not deprive trustees of due process or impose any unreasonable burden on the government:

> The IRS argues that because §549 provides a bankruptcy cause of action, the bankruptcy statute of limitations applies. The Bankruptcy Code provides that an action or proceeding brought under §549 must be commenced within two years of the transfer sought to be avoided. [11 U.S.C.§549(d)]. . . . The IRS's argument fails because the Trustee's suit is not an action or proceeding under 11 U.S.C. §549, but rather a refund suit under 28 U.S.C. §1346(a)(1). The theory underlying the refund suit may involve a §549 unauthorized post-petition transfer, but that does not make it a §549 suit, and therefore §549's statute of limitations is inapplicable.

In re Russell at 927 F.2d 417.

Russell thus provides a clear, simple rule that trustees, debtors-in-possession, the Bankruptcy Courts, and even the government can follow: so long as the procedure established under the Internal Revenue Code for filing an administrative refund claim

with the IRS (and, if necessary, filing a 26 U.S.C. §7422 refund suit) is followed on a timely basis, a refund suit will not be dismissed as untimely. Under this procedure, the IRS receives precisely the notice called for under the Internal Revenue Code (i.e., the administrative refund claim must be timely filed with the IRS), and has the same opportunity to consider refund claims at the administrative level that it would if the taxpayer were not in bankruptcy.[3] If the IRS denies (or refuses to grant) the claim, the taxpayer must then bring its 26 U.S.C. §7422 refund action within the time allowed by the Internal Revenue Code. Thus, the IRS is allowed to follow all of its standard procedures without variation; the Bankruptcy Court is spared needless and duplicative litigation; and taxpayers are spared similar burdens, burdens still greater for trustees and debtors-in-possession, who generally have limited resources. Most important of all, the Russell approach does not require trustees to file illegal "protective" actions over which the Bankruptcy Courts could have no jurisdiction.

In summary, given the uncertainty faced by bankruptcy trustees and debtors-in-possession after the Ninth Circuit's ruling below, and given the awkward illegality of the sole remedial procedure proposed by the government, the issue of whether a trustee can utilize the avoidance powers in §§544-53 of the Bankruptcy Code in a 26 U.S.C. §7422 refund suit without bringing a separate avoidance action, or whether the trustee must first bring an avoidance action and then subsequently litigate her tax refund claim, warrants this Court's review.

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[3] Note that Shaltry filed her administrative refund claim with the IRS well within the 11 U.S.C. §549(d)(1) two-year statute of limitations for bringing a §549 avoidance action, so that the government interest that otherwise would be protected by the §549(d)(1) statute of limitations – the right to be put on notice of the existence of Shaltry's claim – was protected by the filing of the administrative claim.

II. The Eighth Circuit's decision in In re Russell, 927 F.2d 413 (8th Cir. 1991) and the Ninth Circuit's decision are in irreconcilable conflict with regard to the proper procedure for a bankruptcy trustee to follow in seeking a tax refund.

While the government admits that the Eighth Circuit's decision in Russell "reached a contrary result on an indistinguishable set of facts," the government also argues that the conflict "is not yet irreconcilable," citing the hypothetical possibility that the Eighth Circuit "may rehear the issue en banc if it is presented again in that circuit." Brief in Opposition to the Petition, pp. 9, 7-8 and n. 7. The government cannot, of course, cite any basis for its speculation on this point. In fact, the Eighth Circuit was presented with precisely the arguments the government makes here -- in the form of Judge Gibson's dissent in Russell, reported at 927 F.2d 419-20 and now quoted and relied upon by the government (see the government's Brief in Opposition to the Petition, p. 9) -- and rejected these very arguments. As has already been pointed out, the net result of allowing the conflict between the Eighth Circuit's decision inRussell and the Ninth Circuit's decision below to stand will be to leave trustees and debtors-in possession, the Bankruptcy Courts, and even the government uncertain as to the fundamental procedure required to obtain a refund.

III. The majority decision in Russell is correct, and the Ninth Circuit and the dissent in Russell are incorrect.

As Shaltry has already fully briefed the merits of this issue, Shaltry hereby relies on her arguments set forth in her Petition and the authorities cited therein, as well as her arguments and authorities set forth in the other portions of this brief.

IV. The issue of whether the post-petition act of Maryland to consolidate itself with Home America for the purposes of gaining control over Home America's net operating losses was void under 11 U.S.C. §362, not merely voidable under 11 U.S.C. §549, may be reviewed by this Court.

Contrary to what the government claims in its Brief in Opposition to the Petition, p. 10-11, Shaltry **did** raise the issue of whether the post-petition act of Maryland in consolidating with Home America for the purposes of gaining control over Home America's net operating losses was void under 11 U.S.C. §362, not merely voidable under 11 U.S.C. §549, before the Ninth Circuit. See Shaltry's January 2, 2001 Petition for Remand or in the Alternative, Rehearing, at pp. A-20 through A-22 below;[4] and the Petition at p. 13, ¶34. Consequently, this Court may review this issue and Shaltry's arguments and authorities cited at pp. 24-28 of the Petition.

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[4] Note that page number references in the Petition for Remand or in the Alternative, Rehearing reprinted in the appendix have been changed to reflect the smaller format required for appendices for this Court's briefs, but that otherwise the brief as reprinted herein is identical to the brief that was filed with the Ninth Circuit.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in her Petition, Shaltry prays for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit, with regard to the decision of that court reported as In re Home America, 232 F.3d 1046 (9th Cir. 2000).

RESPECTFULLY SUBMITTED this ____ day of July, 2001.

John J. Dawson
QUARLES & BRADY STREICH LANG LLP
Renaissance One
Two North Central Ave.
Phoenix, AZ 85004-2391 (602) 229-5200

COUNSEL FOR THE PETITIONER

Gerald L. Shelley
Benjamin R. Norris
QUARLES & BRADY STREICH LANG LLP
Renaissance One
Two North Central Ave.
Phoenix, AZ 85004-2391
(602) 229-5200

OF COUNSEL FOR THE PETITIONER

Ronald J. Ellett, No. 012697
2828 North Central Avenue, Suite 1150
Phoenix, AZ 85004
(602) 235-9510

OF COUNSEL FOR THE PETITIONER

APPENDIX

No. 98-16631

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HOME AMERICA T.V.-APPLIANCE AUDIO, INC.,
J.G. BOYD T.V.-APPLIANCE AUDIO, INC.,
CHARLESTON T.V. & APPLIANCE CO.,

Debtors,

UNITED STATES OF AMERICA,

Appellant,

v.

WENDA K. SHALTRY; MARYLAND INVESTMENTS, INC.,

Appellees.

ON APPEAL FROM THE JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

PETITION FOR REMAND OR IN THE ALTERNATIVE, REHEARING

Gerald L. Shelley, No. 010453
Benjamin R. Norris, No. 011286234
QUARLES & BRADY STREICH LANG LLP
Renaissance One
Two North Central Ave.
Phoenix, AZ 85004-2391
(602) 229-5200

Ronald J. Ellett, Esq., No. 012697
2345 E. Thomas Road
Suite 410
Phoenix, AZ 85016
(602) 235-9510

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INTRODUCTION AND STATEMENT OF COUNSEL

Bankruptcy Trustee Wenda K. Shaltry moves this Court for remand pursuant to 28 U.S.C. §2106 or, alternatively, a rehearing pursuant to F.R.A.P. 40. The Trustee first asks the Court to remand this matter back to the Bankruptcy Court for findings of fact pertinent to the issue of equitable estoppel and equitable tolling because the Trustee was never previously required (nor, more particularly, given the opportunity) to develop such facts due to the procedural history of the case. As is further explained in the first portion of the Argument section below, because the Government filed a motion to dismiss/motion for summary judgment rather than answering the Trustee's complaint, and because the Government lost that motion (and the Trustee's subsequent motion, which pointed out that the Bankruptcy Court's findings on the Government's motion constituted a sufficient basis for awarding judgment in favor of the Trustee) as a result of the Bankruptcy Court's determinations of the applicable law (now undone by this Court's Opinion), the Trustee never had cause or opportunity to put on all of her evidence. Indeed, had the Trustee attempted to proceed with an evidentiary hearing, in circumstances where the Bankruptcy Court was indicating that it was prepared to rule in favor of the Trustee as a matter of law (which the Bankruptcy Court subsequently did), the Bankruptcy Court would have been puzzled at the least by the Trustee's conduct. Now that this Court has rejected the Bankruptcy Court's interpretation of the law, however, it is only fair that the Trustee be allowed to present the evidence that is now material and relevant as a result of this Court's decision. Given these facts, under 28 U.S.C. §2106 it is "just under the circumstances" to remand this case to the Bankruptcy Court so that the case can be decided on its merits, rather than as a result of its particular procedural history. See, e.g., Waters v Thornburgh, 888 F.2d 870, 877-78 (D.C. Cir. 1989).

Alternatively, the Trustee raises two legal arguments not previously considered because (1) if the Circuit's decision stands, the application of the phrase "action or proceeding" will be at odds with its use in other parts of Title 11 of the United States Code ("Bankruptcy Code") and (2) an egregious violation of the automatic stay will go unaddressed and the result will be a $1.6 million windfall to the Government.[5] The relief sought is consistent with the standard set forth in this Court's decision of In re Professional Investment Properties of America v. Kent, 955 F.2d 623, 625 (9th Cir., 1992):

> Generally, an appellate court will not consider arguments not first raised before the district court unless there were exceptional circumstances. . . . The specific "exceptional circumstances" that this circuit has identified are as follows: (1) review is necessary to prevent a miscarriage of justice; (2) a new issue arises while an appeal is pending because of a change in the law and (3) the "issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed.

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[5] Because the Government has raised many different issues in its efforts to avoid paying out the refund due to the estate, the Trustee has not previously had the opportunity to brief this Court fully on the issue that this Court's Opinion was decided upon; thus, of the Trustee's previously-filed 56-page Response Brief, only pp. 47-51 addressed the issue that this Court has now found to be decisive, because at the time it appeared not to be a primary issue. In these circumstances, the Trustee believes it is fair and proper to more fully brief and consider this issue.

These two arguments must be considered (1) to prevent a miscarriage of justice (allowing the stay violation and its resulting $1.6 million windfall to the Government) and (2) because the Court's holding departs from the only previous existing law on point (In re Russell, 927 F.2d 413 (8th Cir. 1991)).

ARGUMENTS

I. This case should be remanded to the Bankruptcy Court for further proceedings, so that evidence concerning the Government's conduct in misleading the Trustee into relying upon the Government's representations (made within two years of the Trustee's appointment) that the Trustee's refund claim would be granted and that it was only a matter of time until the refund would be issued, can be fully developed.

In its Opinion of November 15, 2000, this Court found that the Trustee failed to show actual reliance on the Government's actions in waiting to file suit until September 24, 1991. Opinion, Sec. B(2). The Trustee respectfully states that, because of the procedural history of this case, she has never had the opportunity to put on evidence of her reliance on the Government's actions, and therefore requests that this case be remanded so that the Bankruptcy Court can make findings of fact with regard to the Trustee's reliance on the Government's actions.[6]

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[6] In this section the Trustee is seeking remand of the case, rather than consideration of an issue not raised below. Thus, the Ninth Circuit's standard for considering such issues does not directly apply. However as the standard in In re Professional Investment Properties of America, 955 F.2d at 625 (9th Cir. 1992) suggests, where the procedural history of the case has been such so that there was no requirement or opportunity to develop the pertinent factual record in the trial court, it would be a miscarriage of justice not to

In her First Amended Complaint Seeking Tax Refund, the Trustee alleged, among other things, that the Government had sent the certain September 17, 1991 letter (referred to in Trustee's initial brief to this Court, at pp. 4-5, and in this Court's Opinion at p. 14615), for the purpose of showing that she had relied upon this representation. See also the Trustee's First Amended Complaint, ¶14. Had the case proceeded in a manner that would have required the Trustee to put on her evidence on this point, she would have done so.

However, the Government did not answer the Trustee's complaint; instead, it filed a motion to dismiss/motion for summary judgement. See the Government's Motion to Dismiss/Motion for Summary Judgment, filed on or about February 17, 1993, (in the previously-filed Trustee's Supplemental Excerpts ("TSE"), pp. 25-31). In the Trustee's response brief, the Trustee specifically noted the September 17, 1991 letter, and that it was the only written indication she had of the Government's intent. See the Trustee's Response Brief filed March 22, 1993, at p. 10, attached hereto as Ex. 1. In her brief, the Trustee relied substantially in this brief on the majority opinion in In re Russell, 927 F.2d 413 (8th Cir. 1991), which the Bankruptcy Court necessarily accepted in ultimately ruling for the Trustee.

In its reply brief filed on or about April 7, 1993, attached hereto as Ex. 2, the Government nowhere disputed the Trustee's arguments that she had relied on the Government's letter of September 17, 1991. The Bankruptcy Court then denied the Government's motion to dismiss/motion for summary judgement. See TSE , p. 34.

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allow a remand of the case to allow the trial court to make findings of fact on the issue in question.

The Trustee subsequently moved for summary judgment in her favor, on the grounds that the Bankruptcy Court's denial of the Government's motion to dismiss/motion for summary judgement left no issues to be resolved in order to grant the Trustee the relief she sought. See Trustee's summary judgment papers and reply brief, Ex. 3 attached. The Government's response to the Trustee's motion for summary judgment did not argue that the Trustee had not relied on the Government's conduct. See TSE, p. 38. The Bankruptcy Court subsequently granted the Trustee's motion for summary judgment. See TSE p. 47.

In short, because at no point did the Government further challenge the Trustee's claim that she had relied on the Government's conduct in delaying bringing this action, the issue was not further litigated before the Bankruptcy Court and no evidence (aside from the September 17, 1991 letter itself, which had already been made a part of the record as an attachment to a brief) was submitted by either party.

The Government then appealed on a number of grounds to the District Court. The District Court vacated and remanded for one purpose only - to have Maryland Investments, Inc. ("Maryland") added as a party, on the grounds that Maryland was a necessary party to the refund action. See District Court's orders dated April 16, 1995 and September 7, 1995, Appellant's Excerpt of Record ("AER") pp. 6 and 22. Given the limited scope of the remand, the Trustee was neither entitled to or required to put on evidence of her reliance on the Government's conduct in delaying the filing of her refund suit.

Consequently, because (a) the Government never disputed the Trustee's reliance on its conduct, and (b) because this case was decided at both the Bankruptcy Court and the District Court levels on the basis that the majority opinion in In re Russell correctly stated the law, the Trustee has never been required to present or had the

opportunity to present evidence of her reliance on the Government's conduct in delaying her refund suit. Now that this Court has ruled that the majority opinion in In re Russell does not correctly state the law, and has made the Trustee's reliance on the Government's conduct a material issue of fact, this case should be remanded to the Bankruptcy Court to allow the Trustee to present her evidence on this issue and to allow the Bankruptcy Court to make the appropriate findings of fact. See 28 U.S.C. §2106, authorizing remand where further proceedings "may be just under the circumstances"; see also Youngstown Sheet and Tube v. Lucey Products, 403 F.2d 135, 138-41 (5th Cir. 1968) (finding, in similar circumstances to those presented here, that remand was proper, so that the case could be decided on its merits).

II. This case should be remanded to the Bankruptcy Court for further proceedings, so that evidence concerning the application of the doctrine of equitable tolling can be introduced allowing the Trustee to pursue her refund claim notwithstanding 11 U.S.C. §549(d).

The doctrine of equitable tolling is distinguishable from the doctrine of estoppel.[7] While estoppel focuses on the conduct of the other party, equitable tolling focuses on whether, through no fault of her own, the plaintiff was unaware of the events giving rise to the claim at the time they occurred, even though the defendant took no active steps to prevent the filing of a suit. See Wright & Miller, Federal Practice and Procedure, §1056, nn. 25.1 and 25.2 and accompanying text (2000). Significantly, the §549(d) statute of

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[7] For the same reasons set forth in the preceding portion of this brief relating to the procedural history of this case, the Trustee did not previously have reason or opportunity to create a record of the evidence that would be material and relevant to determining the application of the doctrine of equitable tolling here.

limitations is not jurisdictional, and is therefore subject to the doctrine of equitable tolling. See In re Olsen, 36 F.3d 71, and n.2 (9th Cir. 1994) (holding that §549(d) statute of limitations may be equitably tolled); Smith v. Mark Twain Nat'l Bank, 805 F.2d 278, (8th Cir. 1986) (stating that the §549(d) statute of limitations is not jurisdictional); see also Norton Bankruptcy Law and Practice 2d, §59:7 (2000) ("Every court to consider the issue has concluded that equitable tolling applies to §549(d)"). Accordingly, a Bankruptcy Court may also exercise its equitable power under §105(a) to recover post-petition transfers at any time, the §549(d) statute of limitations notwithstanding. See In re EZ Feed Cube Co., 123 B.R. 69, 74 (Bkrtcy. Ore. 1991) (court could order former attorney for debtor-in-possession to repay improper post-petition disbursements despite expiration of §549(d) period).

While the period provided for in §549(d) runs from the time of the postpetition transfer and not from the date of the appointment of the trustee, "equity dictates that the[§549(d)]two-year statute of limitations period begin[s] to run only after the trustee knew or should have known of the transfer." In re Dakota Drilling, 135 B.R. 878, 888 (Bkrtcy. N.D. 1991) (holding in case converted from Chapter 11 to Chapter 7 that §549(d) period would begin to run only after date of conversion; cited with approval on this point by this Court in In re Olsen, 36 F.3d 71, 73 n. 2 (9th Cir. 1994)). In In re Olsen, this Court held that where former debtors-in-possession ("DIPs") conveyed property postpetition to their son after conversion to Chapter 7 and appointment of a trustee, the §549(d) statute of limitations was tolled by the "convey[ance of] the property to their son without court authorization and without notice to the trustee," stating "the trustee had no duty to routinely check if the [former DIPs] had clouded legal title. [The trustee] was entitled to rely on the [former DIPs'] prior statements [made in their schedules] and presumed willingness to cooperate." Id. at 36 F.3d 73. "Because the trustee remained in the dark 'without any fault or want of diligence

or care on his part,' the statute did not begin running until he discovered the conveyance." Id.[8]

Equitable tolling does not depend on a finding of actual fraud or concealment. Smith v. Mark Twain National Bank, 805 F.2d 278, 294 (8th Cir. 1986) (reasonable reliance on conduct in question, even where conduct was not intentionally misleading, gave rise to equitable tolling); In re Dakota Drilling, 135 B.R. 878, 888 (Bkrtcy. N.D. 1991) ("This conduct need not be active or intentional; in some situations the inequitable conduct may be passive"; holding that debtor's failure to disclose the transfer in question caused the §549(d) period not to begin to run until the case converted from Chapter 11 to Chapter 7); see also In re Bookout Holsteins, 100 B.R. 427, 430 (Bkrtcy. N.D. Ind. 1989) ("the rationale which supports the proposition, that the conduct of defendant may estop it from claiming

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[8] Unlike the situation presented in In re Gardenhire, 209 F.3d 1145 (9th Cir. 2000), the transfer of the NOLs in this case was not an "innocent" act. While the Government is the ultimate transferee of the NOLs (see In re Feiler, 218 F.3d 948, 956 (9th Cir. 2000)), the transfer of the Debtor's NOLs was made in order to deprive the Trustee and the estate of the NOLs, so that they could be used by another, just as in Feiler. Consequently, this Court's comment in Gardenhire that the line of cases represented by Olsen provides only "limited support" for tolling in instances involving a party that "stand[s] to benefit from literal application of the law but who engaged in no fraud or other wrongful conduct" has no application here, where the party that stood to benefit, Maryland, engineered the transfer prior to the appointment of the Trustee for the specific purpose of depriving the estate of the Debtor's NOLs.

under the statute as a bar, has broadened the doctrine to also include conduct other than active concealment").[9]

Here, as this Court noted in its Opinion, an involuntary bankruptcy was filed against the Debtor by its creditors on September 6, 1989. On September 14, 1989, the Debtor's parent corporation, Maryland, caused the Debtor to consent to the filing of a consolidated return, effecting the post-petition transfer of the Debtor's Net Operating Losses ("NOLs").[10] On September 26, 1989, the Trustee

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[9] That the Trustee should be allowed to present evidence to show that the §549 period should not be deemed to have begun to run until sometime after the actual date of the transfer is also supported indirectly by this Court's holding in In re Mizuno, 223 F.3d 1050 (9th Cir. 2000) (in an involuntary case, the §546 statute of limitations did not begin running until appointment of trustee). While this is a §549 case and not a §546 case, this Court's holding in Mizuno did recognize that there is no trustee in an involuntary case, defacto or otherwise, until the trustee is actually appointed. Furthermore, although the evidence is not yet in the record, because this was an involuntary case, there were no schedules disclosing the existence of this transfer at the time the Trustee was appointed, and the trustee only learned of the existence and nature of the transfer as a result of her own subsequent investigation and other events subsequent to her appointment. Since, in such circumstances, the Trustee cannot reasonably be deemed to have knowledge of the postpetition transfer as of the date of her appointment, the Trustee should be allowed to present evidence to the Bankruptcy Court to show that the §549 period should not be deemed to have begun to run until sometime after the date of her appointment.

[10] For purposes of this brief, the Trustee will not dispute this date.

was appointed.[11] At that time, the Trustee received no bankruptcy schedules and statements disclosing the consolidation election. Maryland had every reason to withhold that information. Upon remand the Trustee can and will introduce evidence upon which the Bankruptcy Court can decide whether equitable tolling applies. The Government will also be entitled to present whatever evidence it may have, and so cannot claim that it would be unfairly prejudiced in any way. To deny the Trustee that opportunity given the undeveloped posture of this appeal would be inconsistent with 28 U.S.C. §2106 and would result in a miscarriage of justice.

III. Alternatively, this Court should rehear this matter, on the grounds that the Trustee's refund action is not barred by the statute of limitations contained in 11 U.S.C. §549, because the Trustee's filing of her refund claim constituted the timely commencement of an "action or proceeding," within the meaning of this phrase as used in the Bankruptcy Code.

As this Court noted in its November 25, 2000 Opinion, there is no question but that the Trustee filed her claim for refund with the Government and put the Government on notice of what she was attempting to do long before the §549(d) statute of limitations expired, no matter how that period is measured; it is only if the filing of the Trustee's refund claim is not treated as an "action or proceeding" under §549(d) that there is any issue at all.

The purpose of a statute of limitations is axiomatic: To give a defendant timely notice that a claim is being asserted, so that the

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[11] The Court's Opinion states (in §1 Background) that the Trustee was appointed September 22, 1989. However, an examination of the docket sheet in the previously-filed Trustee's Excerpt of Record, p. 298, item #29, confirms that the Trustee was not appointed until September 26, 1989.

defendant can marshal and/or preserve whatever evidence it needs to defend itself. Here, the Trustee did exactly that by filing her claim for refund with the Government. It is highly unfair for the Government to argue, as it has here, that a statute of limitations should operate to bar the Trustee's claim for refund on the grounds that while the Trustee had properly followed the formal administrative procedure established by the Government to assert her claim for refund -- filing her claim for refund well before the expiration of the two-year period provided for in §549(d), no matter when that period is deemed to have commenced running -- the Trustee failed to timely sue the Government for its failure to properly grant the refund claim on its merits.[12]

The Trustee respectfully submits that her claim for refund should indeed be treated as the requisite "action or proceeding," thereby satisfying the §549(d) statute of limitations, notwithstanding that this Court reads the phrase "action or proceeding" very narrowly in its Opinion. The phrase "action or proceeding" as found in

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[12] In her opening brief on appeal, the Trustee claimed that she had brought her suit on her claim for refund on the first day possible under the statutes governing refund actions. In its reply brief, the Government pointed out that the Trustee had brought her refund suit four months (not six months) after filing her claim for refund, as the Trustee had claimed, and the Trustee then filed a supplemental brief withdrawing her argument that she had filed her refund suit on the first day possible under the statutes governing refund actions. However, the counsel for the Trustee who drafted the prior briefs for this Court was not counsel for the Trustee at the time the refund suit was originally filed, and so was unaware that the then-counsel for the Trustee had relied upon 11 U.S.C. §505(a)(2)(B)(i) in filing suit exactly four months after the Trustee had filed her refund claim with the Government. Consequently, there is no question that the Trustee was acting as expeditiously as possible in filing her refund suit.

§549(d) appears in eight other locations in the Bankruptcy Code. See 11 U.S.C. §§325, 362(a)(1), 362(b)(1), 362(b)(2)(A), 362(b)(4), 546(a), 550(f) and 922(a)(1). While the meaning of "action or proceeding" has not been litigated with respect to its use in §549(d) (or the similar §546(a)), it has been extensively litigated in the context of the automatic stay of §362.

The legislative history of §362 makes clear that the "scope of this section is very broad and encompasses all proceedings, even those not before governmental tribunals." H.R. No. 595, 95th Cong., 2d Sess. at 340 (1977), reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 6297. For example, in In re International Heritage, Inc., 239 B.R. 306, 310-11 (Bkrtcy. E.D.N.C. 1999), the court held that administrative proceedings brought against the debtor by a state commissioner of securities came within prohibition in 11 U.S.C. §362(a)(1) of "the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor . . . ." The court went on to find that any monetary recovery from the debtor would be prohibited under §362(a)(1), but that to the extent the state was seeking to enforce its police or regulatory power, the administrative proceeding would not be barred by §362(a) because §362(b)(4) provides that §362(a) "does not operate as a stay 'of the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's or organization's police or regulatory power[.]'" Id. at 239 B.R. 311.

Other decisions under §362 support the conclusion that "action or proceeding" includes actions taken at the administrative level, not just litigation or other adversarial contested proceedings. Thus, the suspension by the Department of Health and Human Services of Medicare Care payments to a provider that had filed bankruptcy was held to constitute an "action or proceeding" against the debtor, the commencement or continuation of which is prohibited by §362(a). In re Medicar Ambulance Co., 166 Br. 918, 926-28

(Bkrtcy N.D. Cal. 1994). In another case, a proceeding brought by a state bar to recover costs assessed against an attorney in a disciplinary action has been held to be excepted from the§362(a) automatic stay as an "action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power" under §362(b)(4). In re Williams, 158 B.R. 488, 491 (Bkrtcy. Idaho 1983). Similarly, the United States Custom Service's administrative "liquidation" of its claim against a debtor post-petition has been held to constitute a violation of §362(a) stay. In re Apex Oil Co., 122 B.R. 559, 566-67 (Bkrtcy. E.D. Missouri 1990), aff'd on this issue at 131 B.R. 712, 714-15 (E.D. Missouri 1991). As is noted in both the opinions in Apex Oil, §362 includes a specific provision (§362(b)(9)) that specifically permits a governmental unit to (A) conduct an audit to determine a tax liability; (B) issue a notice of tax deficiency; (C) demand tax returns; or (D) make an assessment for any tax and issue a notice and demand for payment (while barring any tax lien that would otherwise arise from applying. Consequently, as the above-cited cases make clear, the term "action or proceeding" as used in §362 -- and therefore, the entire Bankruptcy Code, including §549(d) -- is intended to include administrative actions of taxing agencies, since otherwise there would be no need to exempt the administrative actions of a taxing entity from the automatic stay. To hold, as this Court has done, that the filing of an administrative claim for refund is not an "action or proceeding" in the context of the Bankruptcy Code is a clear departure from all reported cases interpreting the phrase "action or proceeding," and opens the door to a confused and inconsistent reading of the term "action or proceeding," notwithstanding its repeated use by the Code's drafters throughout the Code.

IV. The post-petition action taken by Maryland Investments to effect a consolidation and thereby avail itself of the benefits of the Debtor's NOLs, violated the automatic stay and under the clear precedent in this Circuit is void, not voidable.

It is undisputed that on September 6, 1989 Home America's creditors filed an involuntary bankruptcy petition initiating this case, and that on September 14, 1989 Maryland mailed its tax return claiming to have irrevocably consolidated itself with the Debtor for the purposes of tax consequences, pursuant to Internal Revenue Code §172(b)(3)(C). Simultaneously, Maryland, as controlling parent of the Debtor, caused the Debtor to consent to the election. The net effect of the consolidation was an "act to obtain possession of property of the estate" or "to exercise control over property of the estate" as contemplated under Bankruptcy Code Section 362(a)(2).

Under clear Circuit precedent such an act is void, not voidable. The case of In re Schwartz, 954 F.2d 569, 574 (9th Cir. 1992) goes to great lengths to stress that the "law in this Circuit is that violations of the automatic stay are void . . ."Schwartz presented a situation where the IRS had issued a penalty assessment during the pendency of a prior bankruptcy case. In the subsequent case, the debtors challenged the assessment. The Court offered some explanation about the differences between §§362 void actions and 549 voidable actions and concluded that:

> Section 362's automatic stay does not apply to sales or transfers of property initiated by the debtor. Thus section 549 has a purpose in bankruptcy beyond the potential overlap with section 362. In other words, the automatic stay can void any violation and still leave section 549 with a valid and important role in bankruptcy. Section 549 exists as a protection for creditors against unauthorized debtor transfers of

> estate property. Although there are circumstances where section 362 overlaps section 549 and renders it unnecessary, this overlap falls far short of rendering section 549 meaningless. (emphasis added).

In this case, Maryland initiated and benefitted (as did the Government) from the election and the Debtor merely (acting as Maryland's puppet) consented to it. Consent of the debtor is insufficient to lift the stay without more. See, e.g., In re Rothenberg, 173 B.R. 4, 14 (Bkrtcy. D.C. 1994), where the court stated:

> An act to create a lien against property of the estate is stayed pursuant to section 362(a)(4). Moreover, even if the [document in question] is invalid and/or does not constitute a lien, [the creditor's] actions were an attempt to exercise control over property of the estate, which is likewise stayed pursuant to section 362(a)(2). The court does not believe that section 303(f)[13] applies to excuse [the creditor's] action which were clear violation of the automatic stay, regardless of whether the debtor consents. (emphasis added)

IRS form 1122 (signed by an authorized representative of the Debtor) (see Exhibit 4) is entitled "Authorization and Consent of Subsidiary Corporation to be included in a Consolidated Income Tax Return." It provides consent no different from a debtor consenting to a lien, as occurred in Rothenberg. The filing the consolidated

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[13] Bankruptcy Code Section 303(f) applies to gap periods in involuntary cases (the period between the Bankruptcy case filing and the time an order for relief is entered) –exactly the situation in the case at bar.

return is tantamount to recording of a lien form, and the Home America's nominal consent does not cure what is an act to obtain possession or exercise control over property of the debtor. The postpetition election to consolidate and transfer the NOLs must be recognized as a violation of the automatic stay, and is therefore void.

CONCLUSION

For the foregoing reasons, the Trustee respectfully requests that the Court remand this case to the Bankruptcy Court for further proceedings to develop the evidence of the events that actually occurred so that the doctrines of equitable tolling and equitable estoppel or, alternatively, for rehearing on the issues of law set forth above.

RESPECTFULLY SUBMITTED this 2nd day of January, 2001.

QUARLES & BRADY STREICH LANG LLP

By:_____

Gerald L. Shelley
Benjamin R. Norris
Renaissance One
Two North Central Avenue
Phoenix, Arizona 85004
Attorneys for the Trustee

STATUTORY APPENDIX

The phrase "action or proceeding" appears in nine (9) separate times in the Bankruptcy Code:

1. 11 U.S.C. §325 provides: "A vacancy in the office of trustee during a case does not abate any pending action or proceeding, and the successor trustee shall be substituted as a party in such action or proceeding."

2. 11 U.S.C. §362(a)(1) imposes: "a stay, applicable to all entities, of --- (1) the commencement or continuation of . . . a judicial, administrative, or other action or proceeding against the debtor . . ."

3. 11 U.S.C. §362(b)(1), defines the §362(a)(1) stay so that it does not included: " . . . the commencement or continuation of a criminal action or proceeding against the debtor. . . ."

4. 11 U.S.C.§362(b)(2)(A), provides that the §362(a)(1) stay does not bar: ". . . the commencement or continuation of an action or proceeding for -- (i) the establishment of paternity; or (ii) the establishment or modification of an order for alimony . . ."

5. 11 U.S.C. §362(b)(4) provides that the §362(a)(1) stay does not bar: " . . . the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction . . ."

6. 11 U.S.C. §546(a) provides that: "An action or proceeding under section 544, 545, 547, 548, or 553" may not be commenced after [the expiration of the specified statute of limitations]."

7. 11 U.S.C. §549(d) provides that: "An action or proceeding under this section may not be commenced after [the expiration of the statute of limitations provided for]."

8. 11 U.S.C. §550(f) provides that: "An action or proceeding under this section may not be commenced after the [expiration of the statute of limitations provided for]."

9. 11 U.S.C. §922(a)(1) provides that a petition filed under Chapter 9 stays, in addition to the §362(a)(1) stay, of "the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against an officer or inhabitant of the debtor that seeks to enforce a claim against the debtor . . ."

ORIGINAL and THREE COPIES filed
by hand delivery this 2nd day of
January, 2001 to:

Cathy A. Catterson
Clerk of the United States Court of Appeals
for the Ninth Circuit
95 Seventh Street
San Francisco, California 94103-1526

TWO COPIES of the foregoing were
mailed this _____ day of January,
2001, to each of the following:

Tom Clark, Esq.
Department of Justice
Tax Division, Appellate Section
Post Office Box 502
Ben Franklin Station
Washington, D.C. 20044

Robert C. Van Voorhees, Esq.
Bryan Cave
2800 North Central Avenue
Phoenix, Arizona 85004